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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

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(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

VERBERG v. STATE.

[137 Ala. 73, 54 South. 848.]

LARCENY.—An Indictment for larceny charging that the accused “feloniously took and carried away” a certain sum of “money of the United States, the further description of which is to the grand jury unknown, the personal property of” a person named, is sufficient and not open to demurrer. (p. 18.)

LARCENY—Changing Money.—If a person takes a piece of money from another to change and places it in his own pocket with the unlawful intent to convert it, or any part of it, to his own use, and refuses to deliver the money given him, or the change therefor, on demand, he is guilty of larceny, and the fact that the taking was open and from the owner is of no consequence, if the intent to steal existed. (p. 18.)

LARCENY—Intent—Question for Jury.—Under an indictment for larceny, the question of the intent with which the accused took the property is for the jury, although the taking was in the presence of the owners. (p. 18.)

INDICTMENT—Waiver of Misnomer.—A plea of not guilty to an indictment is an admission that the name by which the accused is indicted is his true name and a waiver of the fact that it is a misnomer. (p. 19.)

CRIMINAL LAW—Misnomer.—The refusal of a court to allow an accused to withdraw his plea of not guilty and to file a plea of misnomer is matter resting in the discretion of the court, and is not revisable on appeal. (p. 19.)

TRIAL—Instructions.—A request to give written charges to the jury as an entirety is properly refused, if any of them is improper. (p. 19.)

T. Richardson, for the appellant.

M. Wilson, attorney general, for the state.

⁷⁷ TYSON, J. The judgment entry shows that a demurrer to the indictment was overruled. No demurrer appears in the record, however. We cannot, therefore, know what the specific objection to the indictment was if one was made. But whatever it may have been, it would be without avail, since its allegations are clearly sufficient and not subject to any ground of attack by demurrer: Code, sec. 4905; Leonard v. State, 115 Ala. 80, 22 South. 564; James v. State, 115 Ala. 83, 22 South. 565; Owens v. State, 104 Ala. 18, 16 South. 575; Burney v. State, 87 Ala. 80, 6 South. 391; Grant v. State, 55 Ala. 201.

The evidence tended to show that defendant requested Bell, from whom it is alleged he stole the money, to give him a five dollar bill for coin. After the exchange was made, defendant said to Bell: "I think I owe you more, let me count the money over again." Thereupon Bell handed him back the coins to recount. Defendant then ran his hand, in which he had the coins, into his pocket, and upon drawing them out added ten cents to the amount. He then placed the coins in the hand of Bell who put them into his pocket without counting them or summing up their value. Shortly afterward, Bell discovered that defendant had returned to him only two dollars and fifty cents in silver coin, and had retained the sum of two dollars and fifty cents of the total amount he had handed him to recount. It is undoubtedly the law that if the defendant had the intention to appropriate to his own use any part of the money handed back to him to be recounted by him and kept it, he was guilty of larceny: Levy v. State, 79 Ala. 259; Eggleston v. State, 129 Ala. 83, 87 Am. St. Rep. 17, 30 South. 582. The fact that the taking was open and from the owner is of no consequence if the intent to steal existed. And whether or not he had such intent was a question for the jury: Talbert v. State, 121 Ala. 33, 25 South. 690.

At the close of the evidence offered in behalf of the prosecution, the defendant moved the court to exclude it. The motion contained a number of grounds. The only one insisted upon here is that there was a variance between the allegations and the proof. This contention is based upon the theory that the evidence shows that ⁷⁸ the grand jury knew, at the time they found the indictment, the description of the money charged to have been stolen, while the indictment alleges that it was unknown to them. While it is true the evidence shows that Bell informed the grand jury that defendant had stolen silver coins from him of the value of two dollars and fifty cents, it does not

show that he informed them of the number and the denomination of each. Indeed, it is not shown that the witness ever knew, if this were important, the exact number of coins retained by defendant and the denomination of each. All that he did know was, that it was silver money in small coin. From this statement it is manifest no variance is shown. There is clearly no merit in the other grounds of the motion.

The evidence introduced by defendant, which was rebutted by the state, tending to show that his name is Viberg, instead of the one by which he is indicted, was wholly impertinent to the issue in the case. His plea of not guilty was an admission that the name by which he was indicted was his true name and a waiver of the misnomer. Had this evidence remained in, it could have availed him nothing. There was, therefore, no error in excluding it: *Wells v. State*, 88 Ala. 239, 7 South. 272.

The other exceptions reserved to the admission of evidence are unmeritorious. The refusal of the court to allow defendant to withdraw his plea of not guilty and to file a plea of misnomer was matter resting in its discretion and is not revisable: *Hubbard v. State*, 72 Ala. 164.

The defendant's request of the court to give the several written charges must be construed as a request to give them in their entirety. So construing it, if any one of the charges was improper, there was no error in refusing all of them: *Rarden v. Cunningham*, 136 Ala. 263, 34 South. 26. Among them was the affirmative charge, which, of course, could not have been given.

Affirmed.

That Larceny may be committed by converting money delivered to another for the purpose of having it changed, see the monographic note to *People v. Miller*, 88 Am. St. Rep. 578, 579.

UNITED STATES SAVINGS AND LOAN COMPANY v. BECKLEY.

[137 Ala. 110, 33 South. 934.]

USURY—Conflict of Laws.—If a contract is made in one state to be performed in another, the parties may contract for the highest rate of interest allowed by either state without offending against the usury laws of the other, unless this is done as a subterfuge and device to evade usury laws. (p. 20.)

USURY—Conflict of Laws.—If a contract is not usurious in the state where it is made and is to be performed, it will be enforced in another state notwithstanding it would have offended against the usury laws of that state had it been made there. (p. 21.)

CONFLICT OF LAWS.—The place where a contract is delivered or first becomes a binding obligation, is deemed the place of the contract for the purpose of designating what law governs. (p. 22.)

USURY—Conflict of Laws—Mortgage to Secure Loan.—The taking of a mortgage on lands in one state to secure the payment of money borrowed in another does not change the rule in respect to the laws of the place which are to govern the transaction as to usury. This is governed by the laws of the state where the money is borrowed. (p. 22.)

USURY—Conflict of Laws.—Mortgages on land in one state made to a corporation organized and acting in another state in the usual and customary form adopted by such corporation in doing like business, legal in its home state, and containing a stipulation that they are to be governed by the laws of that state, are not mere devices to evade the usury laws of the other state, or made for that purpose, though opposed thereto. (p. 22.)

White & Howze, for the appellant.

S. W. John, for the appellee.

121 TYSON, J. The issue presented by the pleadings in this cause is, whether the note and mortgage executed by complainant to the respondent is an Alabama or a Minnesota contract. It is not contended in argument by complainant that the mortgage is usurious if it is a Minnesota ¹²² contract, nor is it insisted by respondent that it is not usurious if it is an Alabama contract.

It is undoubtedly the law as said in *Pioneer Sav. etc. Co. v. Nonnemacher*, 127 Ala. 545, 30 South. 87, "that where a contract is made in one state to be performed in another state, the parties may contract for the payment of the highest rate of interest allowed by either state without offending against the usury laws of the other; the exception to the rule being that this may not be done as a subterfuge and device and where the purpose and intention of the parties is simply to evade the usury laws." Or to state the proposition in the form in which it is stated in *Hayes v. Southern Home etc. Assn.*, 124 Ala. 669, 82 Am. St. Rep. 216, 26 South. 530: "Under established rules, a note or bond made payable at a particular place or which is expressly made with reference to the laws of a particular state is governed in respect to its obligation as to interest by the law of the place so stipulated as the place of performance. . . . An exception to these rules is where such stipulations are found to

be a mere device to evade the usury laws, in which case they will be held void as against public policy."

Confessedly, these principles are only applicable to contracts made in one state to be performed in another, or where made in one state and contain a stipulation that they shall be governed by the laws of another, where payable, and have no application when the contract is made and to be performed in the same state. In the latter case the locus contractus and the locus solutions being the same, if the contract is not usurious where made and to be performed, it will be enforced by the courts of this state, notwithstanding it would have offended the laws of this state against usury, had it been made here: Story on Conflict of Laws, 8th ed., 397.

A careful examination of the evidence, we think, sustains the contention of the respondent, that the note and mortgage are Minnesota contracts. In addition to the note being made payable at the office of the respondent's treasurer in St. Paul or to its trustee, in Minneapolis, Minnesota, there is a stipulation in both the note and mortgage that they are "understood to be made with reference ¹²³ to and under the laws of the state of Minnesota." Furthermore, the evidence shows that the respondent is a corporation organized under the laws of Minnesota with a place of business in that state. That the written application for the loan and to become a stockholder were each addressed to the company at St. Paul. Although signed in Birmingham and delivered to one of respondent's agents for the purpose of transmitting them to the company, they had to be examined and passed upon by the officers of the respondent at its place of business. After receiving their applications, the note and mortgage, certificate of stock and its assignment were prepared in St. Paul by respondent's attorney and forwarded to its attorneys in Birmingham to have properly signed, recorded, etc., but without authority to finally accept the note and mortgage and certificate of stock for the company. Their acceptance for the security for the loan was to be determined upon after a further examination of the abstract of title and other papers by the attorney of the company in St. Paul. In other words, the evidence shows that there was no delivery of the note and mortgage in Alabama, but that they were in fact delivered in the state of Minnesota. Indeed, the draft drawn by the respondent on its depository for the amount of the loan, while sent to a bank in Birmingham to be handed the complainant, was not to be paid until the papers, after examination by respondent's at-

torney in St. Paul, were approved. This method of payment was in accordance with the agreement made between the parties as shown by the applications for the loan.

It is an elementary principle that a contract must be mutual and no proposition or offer becomes a contract until it is accepted and approved by both parties. It is also the law that "where a contract is delivered or first becomes a binding obligation upon the parties is deemed the place of the contract for the purpose of designating what law governs": 3 Am. & Eng. Ency. of Law, 1st ed., 547; McGarry v. Nicklin, 110 Ala. 559, 55 Am. St. Rep. 40, 17 South. 726. Under the evidence we are constrained to hold that the note and mortgage were executed in Minnesota, and therefore a Minnesota contract: McGarry v. Nicklin, 110 Ala. 559, 55 Am. St. Rep. 40, 17 South. 726, and cases cited therein; Farmers' Savings etc. Assn. v. ¹²⁴ Kent, 131 Ala. 246, 30 South. 874; United States Sav. etc. Co. v. Miller (Tenn.), 47 S. W. 17.

It was entirely lawful for the complainant to borrow money in the state of Minnesota and lawful for the respondent to loan him the money there and to secure its repayment by accepting from him a mortgage on lands in Alabama. And the taking of the mortgage will not change the rule in respect to the laws of the place which are to govern the transaction as to usury. "The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is, to pay where he borrows, unless another place of payment be expressly designated by the contract": De Wolf v. Johnson, 10 Wheat. 368; Tyler on Usury, 88, 89; 1 Jones on Mortgages, 15th ed., sec. 657 et seq. Besides the form of the contract adopted by the respondent in making and securing the loan was the usual and customary one employed by it in doing the same business in twenty-four states and is substantially the same form employed by it since its organization: Bennett v. Eastern etc. Assn., 177 Pa. St. 233, 55 Am. St. Rep. 723, 35 Atl. 684.

Furthermore, if it be conceded that we are mistaken in our finding of the fact from the evidence that the note and mortgage were delivered in Minnesota, but were in fact delivered in Alabama, yet the evidence fails to establish that the stipulations in said note and mortgage "understood to be made with reference to and under the laws of the state of Minnesota" were a mere device to evade the usury laws of this state. No such

sinister purpose appears in the contract, and the evidence fails to afford any reasonable inference that there existed any such sinister motive in making the note payable in Minnesota: *Hayes v. Southern Home etc. Assn.*, 124 Ala. 669, 82 Am. St. Rep. 216, 26 South. 530; *Pioneer Savings etc. Co. v. Nonnemacher*, 127 Ala. 345, 30 South. 87.

Reversed and remanded.

Haralson, J., dissenting.

Conflict of Law in the matter of usury is discussed in the monographic notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201, 202; *McGarry v. Nicklin*, 55 Am. St. Rep. 50, 51. It has been held that a note executed and payable in one state, secured by a mortgage on land in another, is governed by the interest laws of the former: *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12. But a loan by a corporation to a citizen of another state, secured by a mortgage on land in that state, has been governed in the settlement of interest on foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is solvable by the laws of the state of the domicile of the corporation, and is made with reference to its laws: *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. See, further, *People's Bldg. etc. Assn. v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764, 50 Atl. 308; *Hale v. Cairnes*, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; *National Loan etc. Assn. v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837; *Binghamton Trust Co. v. Auten*, 63 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105. A loan by a foreign association to a citizen of this state is solvable by its laws, notwithstanding the loan is stipulated to be paid at the domicile of the association, when such stipulation is designed to evade the usury laws of this state: *Pacific States Sav. etc. Co. v. Hill*, 40 Or. 280, 91 Am. St. Rep. 477, 67 Pac. 103; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314.

ALABAMA COAL AND COKE COMPANY v. SHACKELFORD.

[137 Ala. 224, 34 South. 833.]

• **RECEIVERS OF CORPORATIONS.**—It is No Ground for Appointment of a receiver of a corporation that the directors in office are holding over after the year for which they were elected in default of the election of their successors. The cause of such default is of no consequence. (p. 24.)

RECEIVERS—Corporations.—It is No Ground for the appointment of a receiver of a corporation that its directors have paid to the estate of a deceased kinsman director money of the corporation without authority, or that they have voted to themselves salaries as officers of the corporation in abuse of their trust, or that they have fraudulently sold the corporate lands. (p. 25.)

RECEIVERS—Corporations.—It is No Ground for the appointment of a receiver for a corporation that its stockholders are not allowed access to the corporate books and papers, or that the directors refuse to disclose material facts connected with the corporate business. (p. 26.)

RECEIVER FOR CORPORATION.—A stockholder in a corporation cannot invoke the action of a court of equity in appointing a receiver for the corporation to meet a necessity produced by his own wrong. (p. 26.)

Smith & Smith, for the appellants.

London & London, for the appellees.

230 McCLELLAN, C. J. It is no ground for the appointment of a receiver of a corporation that the directors in office are holding over after the year for which they were elected in default of the election of their successors by the stockholders. And the cause of such default is of no consequence. It may be that the stockholders desired the directors to continue in office and it was inconvenient to meet and re-elect them, or that an election was permitted through mere inadvertence, or that there were such dissensions among the shareholders and the holdings of the dissentients were so equally divided that a majority could not be brought to the support of any set of individuals for the directorate; but whether the failure to elect resulted from any one or the other of these causes or any other whatever, it would leave and continue in office—whether *de jure* or *de facto* is immaterial—directors competent to conserve the property and carry on the business of the corporation, and there would be no necessity to take the concern out of their hands and commit it to a receiver. If the corporation had no directors and none could be elected, a different case would be presented. If there were directors among whom such dissensions existed as that the corporate functions could not be discharged and its assets and business were imperiled in consequence, necessity for the intervention of the court of chancery by the appointment **231** of a receiver might arise: *Sternberg v. Wolff*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 Atl. 397. Or if there are two sets of men, each claiming to constitute the directory, the claim of each being of substantially doubtful validity, and each is scrambling for the possession of the corporate property and the control of the corporate business, a temporary receiver may be appointed at the suit of the stockholders: *Jasper Land Co. v. Wallis*, 123 Ala. 562, 26 South. 659. In all these cases there is strangulation and paralysis of the corporate functions and re-

sulting probability of serious detriment to its property and business, which can be averted only by the appointment of a receiver. This is not true of the case first stated, which is the case at bar. Here there is no strangulation, no paralysis. Here is a board of directors in office, in undisputed possession and control of the corporate assets and in the exercise of all corporate powers and functions; and they are legally competent to conserve the corporate property and carry on its business. Their acts as directors are as efficacious and valid as if they had been elected at the last annual date for the election of directors. They are in the same sense and to the same extent trustees for the stockholders and answerable to them for any breach or abuse of the trust. The property in their hands is in no more peril of maladministration and the business of the concern is no more likely to be improperly carried on than if they had been elected on yesterday. Being trustees, if they have voted to pay and paid to the estate of a deceased kinsman who was a director moneys of the corporation which they had no authority to so appropriate, the complainant, as a stockholder, has the right to call upon them to sue in the name of the corporation for its recovery, and, they declining, he may file a bill in his own name on behalf of the corporation to that end. So, too, if they, as directors, have voted to themselves salaries as officers of the corporation in abuse of their trust, the complainant has like rights and remedies. If they undertake to sell the lands of the corporation in fraud of it to other corporations in which they are interested—of which there is a bare innuendo in Shackelford's affidavit—the court of chancery is wide open to Shackelford both for discovery of the facts and relief upon them. ²³² Moreover, at Shackelford's instance, the stockholders adopted a by-law, which he insists is valid and operative, to the effect that no lands of the corporation should be sold without the consent, by ratification or confirmation, of a majority in value of holdings of all the stockholders, and thus assurance is made doubly sure that no receiver is necessary to protect his interests in respect of the sale of lands. Then there is something in the bill about complainant not being allowed access to the books and papers of the corporation. These averments were not only not proved but affirmatively disproved on the hearing; and were they true the remedy is plain, adequate and complete short of the appointment of a receiver. Then, too, it is said that the directors refuse to disclose material facts connected with the corporate business, the value of its lands and

the like. This, too, fails of proof and constitutes no ground for a receiver if true; and, moreover, the complainant swears that he would not have believed such disclosures if they had been made, and that he so informed the directors.

It is made to appear in the case that practically the only business of this corporation was the collection of a large judgment it had recovered for the taking of coals out of its lands, the settling of titles to its lands, the prosecution of an action for the recovery of certain parcels of it held by a trespasser, and the sale of its lands. The directors in office are not only fully competent to carry on all this business, but they are prosecuting it diligently and properly so far as it appears. If any difficulty should arise in the sale of the lands, it can only come from Shackelford's own unwarranted and capricious objection as a stockholder under the by-law adopted at his instance and to which we have referred above; and surely he cannot invoke the action of a court of equity to meet a necessity thus produced by his own wrong.

As to the action prosecuted by the corporation for the recovery of parcels of its lands, and which is now pending in this court on appeal from a judgment in its favor, it transpires that the Ivy Coal and Coke Company is the defendant in that action, and Shackelford is the president ²³³ of that company. In respect of the money judgment in favor of this corporation and which it was endeavoring to collect when this bill was filed, it is to be noted that said Ivy company of which Shackelford is president is the defendant therein, and that Shackelford himself is personally liable thereon as the company's surety on supersedeas bond for appeal to this court where the judgment was affirmed. As to these matters it would obviously not be the most appropriate thing imaginable for him to exert a controlling influence in the conduct of the corporation, although he owns one-half of its capital stock. He sought a negatively controlling power by insisting that the number of directors should be increased from three to four, and that he and an agent of his should be given two of the places. This might well have produced or resulted in a deadlock and the paralysis of the corporate business; and there is indeed room for suspicion that the motive of this proposal was to thus throw the corporation into convulsions and then call in a receiver to doctor the convulsions. However that may be, in view of the antagonistic attitude of Shackelford to the corporation in respect of said action of ejectment and said money judgment, in connection with the further

fact that he bought into the company pending those actions and from a third party who appears to have been in harmony with the directory, it is not surprising that the holders of the other half of the stock, who are the directors now in office, should have declined this proposition of Shackelford; and there is no room to say that in so doing they were not faithfully representing the interests of the corporation. Their counter-proposition to make him one of the three directors was all that fairness could require from them.

On the case submitted to the chancellor and now again submitted to us, we find no necessity for the appointment of the receiver. The order appointing him must be reversed, and an order will be here entered denying and dismissing the application for the appointment.

Reversed and rendered.

Grounds for the Appointment of a Receiver for a corporation are discussed in the monographic notes to Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 48-60; Cortelyou v. Hathaway, 64 Am. Dec. 485, 486; and the subsequent cases of Sheridan Brick Works v. Marian Trust Co., 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Ball v. Maysville etc. R. R. Co., 102 Ky. 486, 80 Am. St. Rep. 362, 43 S. W. 731.

JOHNS v. McLESTER.

[137 Ala. 283, 34 South. 174.]

CORPORATIONS—Right of Stockholder to Maintain Suit.—

Before a minority stockholder in a corporation can maintain suit in his own name to redress supposed corporate wrongs, he must allege that he has made demand upon the managing officers or governing board of the corporation to correct the wrongs complained of, by legal proceedings or otherwise, and that, meeting with failure or refusal, he has sought redress through the stockholders as a body, or he must allege facts showing that such demand would have been useless. (p. 28.)

F. S. White & Sons, for the appellant.

R. H. Thach, for the appellees.

280 TYSON, J. It cannot be doubted that the alleged wrongs complained of in the bill in this cause, if cognizable at all, are such as could have been righted upon the complaint of the corporation, in which the complainants are stockholders.

In other words, the purpose of this bill is to redress certain alleged injuries done the corporation, which are charged to be damaging to the rights of the complainants as stockholders.

²⁹⁰ It is thoroughly well settled in this state that before a minority stockholder, or any number of them, can maintain a bill of this sort, he or they must make demand upon the managing officers or governing board of the corporation to correct the wrongs complained of, by legal proceedings or otherwise, and meeting with failure or refusal, he or they must next seek redress through the stockholders as a body. And such demand or request must be clearly averred in the bill. Of course, this demand is not required when it is made clearly to appear that it would be refused, or that the litigation following would necessarily be under the control of persons opposed to its success, or when the persons constituting the governing board or a majority of them are the wrongdoers or under their control, and any effort to obtain redress through the stockholders would be unavailing for want of time or other cause. Of course, the excuse for not making the demand upon the governing board or if made upon that body, then the excuse for not seeking redress through the stockholders must be clearly and distinctly averred in the bill: *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 South. 1006, and authorities there cited.

There is not an averment in this bill, which can by any possible construction afford the remotest inference, that the stockholders of the corporation have ever been applied to by these complainants to redress the grievances complained of, nor is there even an inference, from the facts averred, that any good reason exists for not making the application to them. Indeed, we think it can be said that no proper demand is shown to have been made upon the directors. All that is shown in this respect is that one J. A. Van Hoose, who was a stockholder, on the seventeenth day of October, 1899, addressed a letter to "Members of the Board of Directors of Woodlawn Cemetery Co.," requesting them to immediately call a meeting of the board of directors and of the stockholders of the corporation for the purpose of redeeming the property of said company from the respondent, before the expiration of the time of redemption, ²⁹¹ and demanding that they take such immediate steps as are necessary in order to make such redemption. It is obvious from the language employed that the board of directors were not in session when this letter was written, nor is there one word in it calling their attention to the facts upon which the relief is

predicated. And whether the stockholders, constituting the board of directors when this letter was written, were the same persons composing that body when Van Hoose appeared before them and informed them of his agreement with the respondent with reference to postponing the foreclosure sale is not shown. It may be, and we have the right to assume, that the board was composed of entirely different stockholders, who knew absolutely nothing of the agreement between Van Hoose and the respondent and of the other facts alleged. But be this as it may, it is not shown that any governing body of the company were ever informed of the conspiracy alleged between the respondent and the president of the company. It is true that there is an exhibit to the bill ("H"), an unsigned letter of date January 20, 1900, purporting to have been addressed to "Director Woodlawn Cemetery Co.," demanding that a bill be filed, etc., also saying that "the chancery court has practically held that L. W. Johns and E. Erswell were guilty of such fraud in the sale as to invalidate the same, and it is absolutely necessary that this bill be filed in order to protect the interests of the company," but it is nowhere averred that this letter ever reached the director or the board of directors. This being true, it is not necessary to here decide its sufficiency or insufficiency as a demand. The grounds of the demurrer challenging the averments of the bill in these respects should have been sustained.

Reversed and remanded.

ACTIONS BY STOCKHOLDERS ON BEHALF OF CORPORATIONS.

I. Corporation Must Sue Generally.

II. When Stockholder may Sue.

- a. **Must Exhaust Corporate Remedies.**
- b. **Demand on and Refusal to Act by Corporation Must be Alleged.**
- c. **On Whom It Should be Made.**
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- e. **Excuses for Failure to Request Corporate Action.**
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 5. **Relationship as Giving Rise to Presumption of Refusal.**
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- III. Suits in the Federal Courts.
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- IV. What Wrong Must be Inflicted on the Corporation.
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 - a. Must be so in Fact.
 - b. Subscriber.
 - c. Importance of Time of Becoming Stockholder.
 - d. Insignificant Stockholder.

I. Corporation Must Sue Generally.

It is an elementary proposition of law, needing the citation of no authority to support it, that a corporation is an entity distinct and apart from the members who compose it, and that, generally speaking, all duties and obligations owing it can be enforced only by suits brought in its own name. So the right of action for a wrongful conversion of corporate property cannot be brought by stockholders in their individual names, but is in the corporation: *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755; *Tomlinson v. Bricklayers' Union*, 87 Ind. 308. Nor can they sue for goods sold by the corporation, although they are the sole stockholders: *Cutshaw v. Fargo*, 8 Ind. App. 691, 54 N. E. 376, 36 N. E. 650. In such a case, the sole stockholder's succession to its interest must be averred and proved, so as to show that the defendant had promised the plaintiff, understanding that he had succeeded to all the interests of the corporation: *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729. A stockholder cannot sue to restrain slander of title of property belonging to the corporation: *Langdon v. Hillside Coal etc. Co.*, 41 Fed. 609. Where an action was brought against an officer for unlawfully withholding corporate funds, they should be accounted for to the corporation, and a decree ordering payment of the amount to the complaining stockholders in proportion to their stock is erroneous: *Chicago etc. Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying *Boggiano v. Chicago Macaroni Mfg. Co.*, 99 Ill. App. 509.

A stockholder individually cannot maintain a bill in equity to compel the execution of a trust by a person holding corporate property, who undertook to pay off its debts: *Heath v. Ellis*, 66 Mass. (12 Cush.) 601.

In *Smith v. Hurd*, 53 Mass. (12 Met.) 371, 46 Am. Dec. 690, it was held that a stockholder of a bank could not successfully sue its directors for so negligently conducting its affairs that its whole capital was lost, rendering the shares worthless. Chief Justice Shaw, in the course of his opinion, said: "The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them." Nor can a stockholder sue out a writ of error in the name of the corporation without its consent: *Chicago etc. R. Co. v. Northern Trust Co.*, 90 Ill. App. 460. That he may not bring a certiorari in the name of the corporation, without the consent of a majority of the stockholders, see *Silk Mfg. Co. v. Campbell*, 27 N. J. L. 539.

The principle that a stockholder, as such, cannot maintain a suit on his own behalf for an injury to the corporation does not apply, however, where the wrongful acts are not only wrongs against the corporation, but are also violations of a duty owing directly by the wrongdoer to the stockholders: *Eldred v. Ripley*, 97 Ill. App. 503, citing *Ritchie v. McMullen*, 79 Fed. 522. See, also, *Nathan v. Tomkins*, 82 Ala. 437, 2 South. 747; *Meyers v. Scott*, 50 Hun, 603, 2 N. Y. Supp. 753.

II. When Stockholder may Sue.

a. Must Exhaust Corporate Remedies.—While a stockholder cannot sue individually to enforce a duty or obligation owing the body corporate, he may, upon a proper showing, maintain a suit on its behalf: *Metcalf v. American etc. Furniture Co.*, 122 Fed. 115. It therefore becomes necessary to determine what are the necessary conditions precedent to this right.

The leading case on this subject is that of *Hawes v. Oakland*, 104 U. S. 450, where it is said: "Before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must

show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.''

The courts, therefore, will not entertain a suit of this character unless it plainly appears that all remedies within the corporation itself have been resorted to in vain; that the managing body has been applied to to induce action, and has wrongfully refused: *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 South. 1006; *Johns v. McLester* (principal case), 137 Ala. 283, ante, p. 27, 34 South. 174; *Smith v. Bulkley* (Colo. App.), 70 Pac. 958; *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756; *Talbot v. Scripps*, 51 Mich. 268; *Hodgson v. Duluth etc. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Carpenter v. Roberts*, 56 How. Pr. 216; *Flynn v. Brooklyn City R. Co.*, 41 N. Y. Supp. 566, 9 App. Div. 269, affirmed in 158 N. Y. 493, 53 N. E. 520; *Moore v. Silver Val. Min. Co.*, 104 N. C. 534, 10 S. E. 679; *Holton v. New Castle Ry. Co.*, 138 Pa. St. 111, 20 Atl. 937; *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91, 45 Atl. 936; *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244; *Morgan v. Railroad Co.*, 1 Woods, 15, Fed. Cas. No. 9806; *Newby v. Oregon Cent. Ry. Co.*, 1 Saw. 63, Fed. Cas. No. 10,145; *Perdicaris v. Charleston Gaslight Co.*, Chase, 435, Fed. Cas. No. 10,974; *Pond v. Vermont Val. R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265; *Hutton v. Jos. Bancroft etc. Co.*, 83 Fed. 17; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *Dimpfell v. Ohio etc. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573.

In *Brewer v. Boston Theater*, 104 Mass. 378, it is said, speaking of suits of this character: "It is only from the necessity of the case, and to prevent a failure of justice, that suits in equity in the form of these bills are allowed. To justify a suit in this form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all authorities agree. There is some diversity as to what will satisfy the requirement. Whether there must be an effort to move the corporate body to the redress of its own injuries, and, to that end, an attempt to procure a meeting and vote of the stockholders, or whether an application to the present board of officers by whom the corporate affairs are managed, and a refusal by them to allow proceedings in its name and behalf, would be sufficient, does not seem to have been determined by any clear concurrence of decision. It may depend somewhat upon the character of the corporate organization, and the extent of powers confided to its officers for the time being. Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant." Where the

plaintiff could obtain the co-operation of a majority of stockholders, or was in control of the corporation, it was held that the corporation itself must sue: *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Loomis v. Missouri Pac. Ry. Co.*, 165 Mo. 469, 65 S. W. 962.

b. Demand on, and Refusal to Act by Corporation Must be Alleged.—These allegations of demand and refusal of the corporation itself to proceed must be alleged in the complaint: *Ide v. Bascomb* (Colo. App.), 72 Pac. 62; *Wilkie v. Rochester etc. Ry. Co.*, 12 Hun, 242; and a failure to make such allegation gives a stockholder no standing in court: *Ware v. Bazemore*, 58 Ga. 316; and will render the pleading bad on demurrer: *Vanderbilt v. Garrison*, 3 Abb. Pr. 361.

So a stockholder cannot question a corporate deed in the absence of averments showing that the corporation itself has failed, after a proper application, to bring suit to set it aside: *Savings etc. Co. v. Bear Valley Irr. Co.*, 112 Fed. 696. And where a mortgage made by the officers of a corporation had been foreclosed, a stockholder cannot obtain an injunction to restrain levy and sale under a *fiery facias*, without showing good reason why the corporation itself has not brought the bill: *Henry v. Elder*, 63 Ga. 347.

The averments of request upon the corporation to proceed must be clearly set forth, and vague and general allegations of fraud on the part of the directors are not sufficient: *Ziegler v. Lake St. etc. R. Co.*, 76 Fed. 662, 22 C. C. A. 465, affirming 69 Fed. 176; nor is an allegation of the assumption of the expenses of suit by the stockholders such as will fulfill the requirements: *Warren v. Shoe Co.*, 166 Mass. 97, 44 N. E. 112. A request and refusal must be shown, and it is not enough to say that the directors will not bring the suit: *House v. Cooper*, 30 Barb. 157, 16 How. Pr. 292; and the specific facts must be set forth, and not general allegations: *Swope v. Villard*, 61 Fed. 417.

c. On Whom It Should be Made.—The demand for action must be made upon the governing body, the directors or trustees, and this is not complied with by requesting the president to sue: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. Such demand should be made upon the directors as a board, and not individually: *Latimer v. Richmond etc. R. Co.*, 39 S. C. 44, 17 S. E. 258.

A demand is not necessary in order to enable a director to maintain a suit on behalf of his corporation, where express authority to sue is conferred upon him by statute: *Miller v. Barlow*, 79 N. Y. Supp. 964, 78 App. Div. 351.

d. Where a Receiver is in Charge.—No demand for redress upon the corporate authorities is necessary where the functions of the corporation have been suspended by the appointment of a receiver, its faculty for suing then no longer existing: *Walter v. McAlister Co.*, 48 N. Y. Supp. 26, 21 Misc. Rep. 747, 27 Civ. Proc. Rep. 83. But in

Cunningham v. Wechselberg, 105 Wis. 359, 81 N. W. 414, it was held that where a receiver was in charge of a corporation, a stockholder could not sue till the court had been appealed to to direct the receiver to bring action. A refusal by the receiver will not empower a stockholder to sue, and application should be made to the court: *Swope v. Villard*, 61 Fed. 417.

e. Excuses for Failure to Request Corporate Action.

1. Futility of Demand Must be Alleged.—An exception to the rule that a demand upon the corporation to proceed exists where such request would obviously be useless and unavailing, as the law does not require the doing of a vain and idle act: *Memphis etc. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108; *Jefferson County etc. Bank v. Francis*, 115 Ala. 317, 23 South. 48; *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 South. 659; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899, affirming 22 Ill. App. 91; *Bruschke v. Der Nord etc. Verein*, 145 Ill. 453, 34 N. E. 417; *Schoening v. Schwenck*, 112 Iowa, 733, 84 N. W. 916; *Atchison etc. R. Co. v. Sumner County Commrs.*, 51 Kan. 617, 33 Pac. 312; *Forrester v. Boston etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *Barr v. New York etc. R. Co.*, 96 N. Y. 444; *Wenzel v. Palmetto Brewing Co.*, 48 S. C. 80, 26 S. E. 1; *Tazewell County v. Farmers' etc. Trust Co.*, 12 Fed. 752.

The excuse must be alleged particularly and definitely, and the facts upon which it is based, mere conclusions not being sufficient: *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 South. 569; *Decatur etc. Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 South. 515; *Albers v. Merchants' Exchange*, 45 Mo. App. 206; and if no request, or excuse therefor, is alleged, the complaint states no cause of action: *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244.

2. Where the Officers are the Wrongdoers.—A valid excuse, often employed, is that the managing officers of the corporation are themselves the wrongdoers, against whose actions relief is sought; that in the litigation about to be commenced, they would be the defendants; and that it would be unavailing to request them to sue themselves. Where therefore, such officers are in control of the corporation, allegations setting forth those facts dispense with the necessity of a demand to sue: *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 South. 569; *Mayle v. Landers (Cal.)*, 21 Pac. 1133; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Brewer v. Boston Theater*, 104 Mass. 578; *Hannerty v. Standard Theater Co.*, 109 Mo. 297, 19 S. W. 82; *Loomis v. Missouri Pac. Ry. Co.*, 165 Mo. 469, 65 S. W. 962; *Albers v. Merchants' Exchange*, 45 Mo. App. 206; *Fitzgerald v. Fitzgerald etc. Co.*, 41 Neb. 374, 59 N. W. 838; *Appleton v. American Malting Co. (N. J.)*, 54 Atl. 454; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212; *Brewster v. Hatch*, 10 Abb. N. C. 400; *Davis v. Congregation*, 57 N. Y. Supp. 1015, 40 App. Div. 424; *Ithaca Gaslight Co. v. Tre-*

man, 30 Hun, 212; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498; *Loftus v. Farmers' etc. Assn.*, 8 S. Dak. 201, 65 N. W. 1076; *Becker v. Real Estate Co.*, 80 Tex. 475, 15 S. W. 1094, citing *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846; *Joy v. Fort Worth etc. Co.* (Tex. Civ. App.), 58 S. W. 173; *Crumlish v. Shenandoah Val. R. Co.*, 28 W. Va. 623; *Eschweiler v. Stowell*, 78 Wis. 316, 23 Am. St. Rep. 411, 47 N. W. 361.

Where the directors would pay no attention to a demand for relief, a stockholder may maintain a bill to vindicate the corporate rights: *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1006. So where the officers' interests are opposed to the suit, or they are confederating with the defendants in the misconduct, or the directors are under the control of the very persons who must be the defendants in the proposed action, no request is necessary: *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118, affirmed in *Bohmrich v. Knoop*, 50 N. J. Eq. 485, 27 Atl. 636; *Currier v. New York etc. R. Co.*, 35 Hun, 355; *Meyers v. Scott*, 50 Hun, 603, 2 N. Y. Supp. 753; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460. Where two of the four directors are in a conspiracy to defraud the corporation, and all four unite in resisting the assertion of corporate rights, a demand is useless, and suit may be instituted without it: *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810. See, also, *Tevis v. Hammersmith (Ind.)*, 66 N. E. 79, 912, affirmed in 67 N. E. 672. But the mere fact that the officers are pecuniarily interested adversely to the complainant does not of itself excuse proper efforts to obtain redress: *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948.

3. **Common Directors of Two Corporations.**—Cases have arisen in which rival corporations have had common directors upon the managing boards, and have committed wrongful acts, detrimental to one of the companies, in order to advance the interests of the other. *Boaz v. Sterlingworth etc. Co.*, 73 N. Y. Supp. 1039, 68 App. Div. 1, was a case of that kind, where the following language is used: "According to the complaint and the facts to be inferred therefrom by fair intendment, the officers and board of directors of the corporation in which plaintiff is a stockholder have given the use of all its property to a rival foreign corporation, of which they are also the officers and directors, without consideration, and without the consent of the stockholders. It is manifest that directors who would so betray their trust would not, by a mere demand and assertion of his rights on the part of a minority stockholder, be transformed into champions of the interests of the stockholders before the courts or elsewhere, or endeavor in good faith to undo the wrongs committed, or in process of commission, by themselves. In effect it would be requesting them to sue themselves. Such a demand, under these circumstances, would be futile and may well be dispensed with." See, also, *George v. Central R. R. Co.*, 101 Ala. 607, 14 South.

752, a demand being held needless where a majority of stock was shown to be owned by a rival corporation, which controlled the managing bodies of the first company. In *Pittsburg etc. Ry. Co. v. Dodd*, 24 Ky. Law Rep. 2057, 72 S. W. 822, it is said: "The directors need not be dishonest. It is enough if their situation is such that by reason of conflict of interest they cannot or should not act."

4. **Where the Corporation has Abandoned Business—No Managing Body.**—Where the corporation has abandoned business, no demand is necessary: *Tennessee etc. Min. Co. v. Ayers* (Tenn.), 43 S. W. 744; *Crumlish v. Shenandoah Val. R. Co.*, 28 W. Va. 623. And the same applies where there is no governing body upon which a request could be made: *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666. An allegation that all of the officers have absconded and that their whereabouts are unknown, shows sufficiently that it was impossible for a stockholder to make a demand: *Wilcox v. Bickel*, 11 Neb. 154, 8 N. W. 436. That a stockholder of a dissolved corporation may sue to set aside a void judgment rendered against it, see *Musson v. Richardson*, 11 Rob. (La.) 37.

The fact that a corporation is no longer a going concern does not, however, dispense with the necessity for a demand: *Dillon v. Lee*, 110 Iowa, 156, 81 N. W. 245.

5. **Relationship as Giving Rise to Presumption of Refusal.**—The mere fact that three stockholders control the election of the seven directors of a corporation and actually elected them does not, of itself, give rise to the legal presumption that the directors thus elected would refuse to discharge their duties to the corporation and the stockholders, when requested by the latter: *Decatur etc. Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 South. 515, disapproving *Mack v. De Bardeleben etc. Iron. Co.*, 90 Ala. 396, 8 South. 150.

How far the question of relationship between a director and a defendant may excuse a demand, is brought out in *Siegman v. Maloney* (N. J.), 54 Atl. 405, affirming 63 N. J. Eq. 422, 51 Atl. 1003. The action was to recover dividends illegally declared by certain persons while directors of the corporation; and the facts are stated by the court as follows: "It appears from an examination of the allegations of the bill that only five of the twelve directors in office at the time of the institution of the suit were upon the board at the time when the illegal dividends were declared and paid; and it was admitted in the bill that, notwithstanding this fact, the complainant did not apply to the board to bring suit for the purpose of obtaining the relief sought by the bill before beginning this action. He alleges in excuse of his failure in this regard that, in addition to the five members who participated in the declaration and payment of the illegal dividends, one other was a brother of, and connected in business with, one of the individual defendants,

and that still another is 'an employé and representative of one of the other individual defendants,' and insists that for this reason he was justified in assuming that an application to the board to bring this suit would have been refused.

"The fact that a majority of the board of directors in office at the time of filing this bill had no part in the declaring or payment of the illegal dividends is sufficient to defeat the complainant's right to sue, unless the facts set out in the bill with relation to two of that majority afford sufficient grounds for concluding that one or the other of those two would, in willful disregard of the interests of the corporation, vote with the directors against whom relief is sought, and by doing so defeat an application to the board of directors to prosecute. But in our judgment, these facts justify no such conclusion. On the contrary, the presumption is that, notwithstanding the relations existing between the two directors and two of the individual defendants against whom relief is sought, the former would faithfully discharge the duty which they owed to the corporation and its stockholders, although their action would necessarily have an injurious effect upon the interests of those defendants. Neither the existence of blood nor of business relationship justifies a presumption of dishonesty under the conditions referred to."

6. **Miscellaneous Instances.**—Where a corporation is about to sell part of its property to a lower, instead of a higher, bidder, the difference in amount being large, and it not appearing that the former was a more desirable purchaser, a stockholder may sue to enjoin such sale without requesting the directors to do so, where they passed a resolution accepting, as far as they could, the lower offer, which they would not rescind: *Lewisohn v. Anaconda etc. Min. Co.*, 50 N. Y. Supp. 263, 23 Misc. Rep. 31.

Where a corporation issues illegal stock, which it treats as good, a stockholder may sue to cancel it as a cloud on his rights, no demand being necessary, as the corporation could not sue to cancel its own stock, for it would be estopped to deny the validity of the subscription by which it was procured: *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048.

7. **Presumption as to the Continuance in Office of the Same Directors.**—As has been already stated, where the board of directors, or a majority of them, are the parties against whom relief is sought, no previous demand to sue is necessary. The court will not presume, where there is an election every year, that the same directors who were in default continued in office: *Corning v. Barrett*, 48 N. Y. Supp. 1013, 22 Misc. Rep. 241. Where, however, a statute provides that every corporation must file annually, within thirty days after the election of officers, a report of the directors, and that directors shall hold for one year and until others are elected and qualify, the fact that the corporation did not file any report of the election of directors since the year when the default occurred, justifies the

conclusion that no election has been held since, and that the same directors were in office when the suit was begun: *Appleton v. American Malting Co.* (N. J.), 54 Atl. 454.

In *Fry v. Rush*, 63 Kan. 429, 65 Pac. 701, it was held that where a statute provided for the annual election of directors, and for the filling of vacancies on the board, an allegation that certain vacancies existed at one time, or that the directors in office at a particular time were inefficient or derelict in duty, did not give rise to a presumption that such a state of facts would continue from year to year.

III. Suits in the Federal Courts.

a. **Importance of Equity Rule 94.**—Before a stockholder can maintain suit on behalf of a corporation in the federal courts, a strict observance of equity rule 94, promulgated by the supreme court of the United States, is necessary. This rule reads as follows: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

The reasons leading to the adoption of this rule are fully given in *Hawes v. Oakland*, 104 U. S. 450, the purpose being to prevent the wrongful exercise of the jurisdiction of the federal courts by bringing a suit in the name of a stockholder when the jurisdiction could not have been invoked if the suit had been brought in the name of the corporation: *Old Colony Trust Co. v. Dubuque Light Co.*, 89 Fed. 794. This rule is not a technical one, but is jurisdictional: *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232. Where, therefore, there is a constitutional question involved, the court has jurisdiction regardless of the citizenship of the parties, and the rule does not apply: *Ball v. Rutland R. Co.*, 93 Fed. 513; nor does it when the relief is sought by a petition of intervention in a suit already pending, of which a federal court has jurisdiction: *Old Colony Trust Co. v. Dubuque Light etc. Co.*, 89 Fed. 794; nor where the action was begun in a state court and removed to a federal tribunal: *Earle v. Seattle etc. Ry. Co.*, 56 Fed. 909.

Where the right of action is one which the corporation could not enforce, but is to the stockholder individually, no demand on the officers is necessary under rule 94: *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337. But it is necessary where the right of action is in the corporation: *Clarke v. Eastern Bldg. etc. Assn.*, 89 Fed. 779;

Dickinson v. Consolidated Traction Co., 114 Fed. 232; *Worth Mfg. Co. v. Bingham*, 116 Fed. 785. And see *Weidenfeld v. Allegheny etc. R. Co.*, 47 Fed. 11; *Heidenfeld v. Sugar Run R. Co.*, 48 Fed. 615. It is not enough, under rule 94, that the corporation would probably refuse, but it is imperative that the rule be followed: *Foot v. Cunard Min. Co.*, 17 Fed. 46. So he must exhaust all means of redress within the corporation itself: *Bill v. Western Union Tel. Co.*, 16 Fed. 14.

Not only are a demand and refusal necessary, but it must also appear that the complainant was a stockholder at the time of the transaction which is the basis of the suit, or that the shares since devolved on him by operation of law: *Dannmyer v. Coleman*, 11 Fed. 97; *Bimber v. Calivada Colonization Co.*, 110 Fed. 58.

The demand must be more than a mere formal one, and a general averment of request and refusal is not a sufficient compliance with the rule: *Elkins v. City of Chicago*, 119 Fed. 957. See, also, *McHenry v. New York etc. R. Co.*, 22 Fed. 130. Where the bill shows that the stockholders addressed a communication to the president of the company, calling his attention to the violations of the charter, and requesting the directors to oppose the acts complained of, and that the company declined to comply with the request, this fulfills the requirements of the rule: *Ball v. Rutland R. Co.*, 93 Fed. 513. See, also, *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, as to what is a sufficient demand. The efforts to obtain redress must be made by the plaintiff, and not other parties: *Dannmyer v. Coleman*, 11 Fed. 97.

b. Conflict as to Whether Demand may be Dispensed With.—In *Squair v. Lookout Mt. Co.*, 42 Fed. 729, it was held that the transfer of stock of the defendant to another corporation would not be enjoined, where the efforts to secure redress within the corporation were not set forth, as required by rule 94, although it was alleged that the directors of the one corporation held a similar position in the other. So, where a failure to aver an effort to secure remedial action from the directors is attempted to be excused by the allegation that five of the seven directors who participated in the original wrong are still members of the board, this is not enough: *Church v. Citizens' St. R. Co.*, 78 Fed. 526, the court saying: "Applying the general principles of equity jurisprudence, and following the current of authority in the state courts on the subject, the court would be clearly of opinion that that would be a sufficient excuse. But the language of the rule in question, and the interpretation that has been given by the court which promulgated the rule, make it obvious that it was the purpose to introduce a more stringent rule in the national courts than the rule which is applied on the same subject in the state courts, and that such an excuse as is offered here does not satisfy the rule." But see *Weir v. Bay State Gas Co.*, 91 Fed. 940, where it is held that this rule introduced no new principle of law, but was only to prevent collusive suits.

There are, however, other federal decisions to the effect that such demand and refusal, and an averment of the facts leading thereto, are not required by rule 94 on all occasions. So where it appears that the guilty parties are in control of the corporation, so that the ensuing litigation would be against themselves, it has been held that a request may be dispensed with: *De Neufville v. New York etc. Ry. Co.*, 81 Fed. 10, 26 C. C. A. 306; *Rogers v. Nashville etc. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517; *Berwind v. Canadian Pac. Ry. Co.*, 98 Fed. 158; *Eldred v. American Palace Car Co.*, 99 Fed. 168. See, also, *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232. It is said in *Young v. Alhambra Min. Co.*, 71 Fed. 810: "The effect of the ninety-fourth rule was to make the question of collusion or improper jurisdiction a preliminary one. But where the bill, in all of its averments, shows that the controversy is substantially between citizens of different states, and there is no collusion, all of the ends of the rule are already met. To require more would be to exalt the means above the end." See, also, *Excelsior etc. Co. v. Brown*, 74 Fed. 321, 20 C. C. A. 428, 42 U. S. App. 55, where the bill was to preserve a corporation which was being wrecked by the officers thereof for their own private ends, and it was held absurd to show that the officers had been requested to convict themselves of fraud.

c. **Effect in State Courts.**—The ninety-fourth rule just discussed has been mentioned in some decisions of the state courts. In *Parson v. Joseph*, 92 Ala. 405, 8 South. 788, it is considered merely a rule of practice, not a general principle of law, and not adopted in Alabama. And it does not apply to suits in Colorado: *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46. After speaking of actions by stockholders on behalf of corporations, the court proceeded: "It is worthy of note in passing that the subsequent decisions of the United States court upon this question are of little value in the state courts, for the reason that all such decisions must necessarily have been founded upon this rule, although, in some of the cases, mention of the rule is not to be found in the opinion."

IV. What Wrong Must be Inflicted on the Corporation.

a. **Generally.**—Before a court of equity will interfere with the management of a corporation at the instance of a stockholder, some injury must be shown, and some wrongful or fraudulent act committed or about to be committed: *Wills v. Porter* (Cal.), 61 Pac. 1109; *Moore v. Silver Val. Min. Co.*, 104 N. C. 534, 10 S. E. 679; *Latimer v. Richmond etc. R. Co.*, 39 S. C. 44, 17 S. E. 258; *Kessler v. Ensley Co.*, 123 Fed. 546; *Dimpfeil v. Ohio etc. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573.

In *Hawes v. Oakland*, 104 U. S. 450, in the course of his opinion, Judge Miller said: "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appro-

prate plaintiff, there must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court will be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.''

The cases in which equity has allowed stockholders to maintain suits on behalf of their corporations, vary as to their object and character. In *Hiscock v. Lacy*, 9 Misc. Rep. 578, 30 N. Y. Supp. 860, this fact is well illustrated by the various cases there cited, the court saying: "Thus, directors have been restrained upon the application of stockholders from misapplying funds: *Carpenter v. New York etc. R. R. Co.*, 5 Abb. Pr. 277; from so violating the charter as to hazard its forfeiture; *Rendall v. Crystal Palace Co.*, 4 Kay & J. 326; from unfairly discriminating between stockholders so as to give one an advantage over the other: *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 510; from so contracting with themselves, in the name of the corporation as to secure an undue advantage at its expense: *Wardwell v. Railroad Co.*, 103 U. S. 651; from obtaining a valuable and exclusive privilege through their control over the corporation: *Koehler v. Black River etc. Co.*, 2 Black, 715.

"The courts have not only restrained directors from performing unauthorized acts, but they have also awarded affirmative relief by compelling the performance of acts required by good faith to the stockholders. Thus, they have compelled directors to perform a duty imposed by statute: *People ex rel. Miller v. Cummings*, 72 N. Y. 433; to defend against unfounded and illegal claims: *Bronson v. La Crosse etc. R. R. Co.*, 2 Wall. 283; to resist the collection of a tax which the directors themselves believed was imposed in violation of law: *Dodge v. Woolsey*, 18 How. 331, to declare a dividend, where the surplus warranted it and the by-laws provided for it: *Belfast etc. R. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362; to declare a dividend where the right was not only clear but fixed by contract: *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 157; to pay over to a stockholder his share of corporate moneys that have been mis-

applied, but which ought to have been divided as dividends: *Brown v. Buffalo etc. R. R. Co.*, 27 Hun, 342; *Richardson v. Vermont etc. R. R. Co.*, 44 Vt. 613; *Dent v. London Tramways Co.*, L. R. 16 Ch. Div. 344."

b. **Fraud.**—Where fraud is practiced on a corporation by a promoter and the corporation refuses on request to sue him therefor, a stockholder may do so for himself and all other stockholders wishing to come in: *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951. So where there is a combination among the officers, a stockholder is entitled to relief: *Sellers v. Phoenix Iron Co.*, 13 Fed. 20. And one stockholder may sue for all to restrain the collection of illegal taxes, the trustees refusing to do so: *Forbes v. Gracey*, Fed. Cas. No. 4924, affirmed in 94 U. S. 762. That a stockholder may obtain preventive justice until the will of the body of stockholders can be ascertained, where irreparable injury may ensue, see *Samuel v. Holladay*, Woolw. 400, Fed. Cas. No. 12,288.

In *Mathews v. Bank of Allendale*, 60 S. C. 183, 38 S. E. 437, a stockholder was allowed to maintain an action for the appointment of a receiver, an accounting from the officers, and to wind up the affairs of the corporation and pay out its assets to stockholders, where the stockholders so authorized the officers, who, after having accepted the trust, and paid part of the stock to the stockholders, commenced a banking business, lending out money, and incurring losses. This case is there distinguished from two earlier cases of the same court, *Lattimer v. Richmond etc. R. R. Co.*, 39 S. C. 44, 17 S. E. 258, and *Wenzell v. Brewing Co.*, 48 S. C. 80, 26 S. E. 1, in the two latter cases the corporations being going concerns, while in the former its members had ordered that it go into liquidation.

A stockholder cannot enjoin the enforcement of a decree foreclosing a mortgage, where there is no fraud: *Van Kirk v. Adler*, 111 Ala. 104, 20 South. 336; nor can he sue to set aside a judgment, there being no allegation of wrong or collusion between the judgment creditor and the directors, or any deception practiced by the creditor on the court or adverse party in obtaining the judgment: *Hendrickson v. Bradley*, 85 Fed. 508, 29 C. C. A. 303. And see *Ward v. Salem R. Co.*, 108 Mass. 352. Where it appeared that a director wrongfully appropriated money to his own use under the guise of an increased salary, which the plaintiff, a director, vainly protested against, that the defendant then called a directors' meeting and procured a majority of the board to pass a vote making the said increase of salary as from its original date, and approving the past payments, that the plaintiff protested and demanded the repayment of the money which was refused, and that the defendant concealed the financial affairs and books of the corporation, enough is alleged to require the defendants to answer the bill: *Blair v. Telegram Newspaper Co.*, 172 Mass. 201, 51 N. E. 1080.

Where a stockholder sues to set aside a sale of corporate property for fraud, the resolution authorizing the sale, and the deed made in

pursuance thereof reciting that it was made on account of the great indebtedness of the corporation and its inability to pay its debts, the complaint may properly deny such recitals and allege that the corporation was able to meet the indebtedness, as showing fraud, and if the answer denies these facts it raises material issues, and evidence thereof is admissible: *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024. As to what are sufficient allegations of fraudulent collusion by officers, see *Cross v. Johnson*, 20 Wash. 124, 54 Pac. 1000. The facts of which the invalidity complained of consists must be set forth and not mere conclusions of law: *Thompson v. Moxey*, 47 N. J. Eq. 538, 20 Atl. 854.

c. **Voidable Contracts.**—The mere fact that the same persons are directors of a lessor and lessee corporation, while it might entitle either corporation to avoid the lease, is not of itself sufficient to avoid the contract at the instance of a stockholder, against the will of the corporation: *Wallace v. Long Island R. Co.*, 12 Hun, 460; *Hart v. Ogdensburg etc. R. Co.*, 89 Hun, 316, 35 N. Y. Supp. 566; *Burden v. Burden*, 8 App. Div. 160, 40 N. Y. Supp. 499.

d. **Ultra Vires Acts.**—Where a corporation is doing acts beyond its power, a single stockholder may maintain a suit to stop or prevent it: *Byrne v. Schuyler etc. Mfg. Co.*, 65 Conn. 536, 31 Atl. 833; *Smith v. New York Consol. Stage Co.*, 18 Abb. Pr. 419; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, reversing 40 Hun, 392; *Dodge v. Woolsey*, 59 U. S. (18 How.) 531; and it makes no difference that the acts complained of are beneficial to him or the corporation, as he has a right to stand on his contract: *Central R. Co. v. Collins*, 40 Ga. 582; *Davis v. Congregation*, 57 N. Y. Supp. 1015, 40 App. Div. 424. In *Albers v. Merchants' Exchange*, 45 Mo. App. 206, however, it is held that though the act complained of is ultra vires, before a court will interfere it must clearly appear that the complainant is not the only one, or that, if he is, his loss is of a substantial nature. Not only is the right of a stockholder to intervene to prevent ultra vires acts based upon a breach of trust, but also because such unauthorized acts will endanger the corporate existence: *Stewart v. Erie etc. Co.*, 17 Minn. 372.

e. **Acts Involving the Use of Discretion.**—It is settled that the courts will not interfere with the business of a corporation unless there is gross mismanagement: *Watkins v. North American Land etc. Co.*, 107 La. 107, 51 South. 683, that there must be a clear refusal on the part of the directors, involving a breach of duty, to authorize a suit by a stockholder: *City of Memphis v. Dean*, 75 U. S. (8 Wall.) 64. See, also, *People v. State Treasurer*, 24 Mich. 468.

In matters involving the exercise of discretion or of judgment, the directors are supreme, and a stockholder cannot come into court basing his action upon these: *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 53 N. E. 520, affirming 9 App. Div. 269, 41 N. Y. Supp. 566; *Southwest etc. Gas Co. v. Fayette etc. Gas Co.*, 145 Pa. St. 13, 23 Atl. 224, 20 Week. Not. Cas. 247. Speaking in this connection the

court in *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448, said: "It by no means follows that the mere refusal of the corporation to bring a suit will authorize any stockholder dissatisfied with such decision to himself conduct the suit. A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such associations to bring suit upon every supposed wrong or injury to the corporation. If it were so, strangers could never know when a settlement, compromise, or adjustment was a finality if the matter was subject to be overhauled at the suit of any discontented shareholder. So a suit might appear so desperate, or be so expensive, or, for good reasons, impolitic, that directors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the courts will rarely suffer a shareholder to overturn such decision by entertaining his suit for the same cause of action. To authorize his suit, the refusal of the corporation to sue must appear to have been wrongful: *Morawetz on Private Corporations*, sec. 244."

Where the directors of a bank refuse to oppose the collection of a tax, which they themselves believe to be unconstitutional, a stockholder may come into court and seek relief, as such refusal amounts to a breach of trust, and is not a mere error of judgment: *Dodge v. Woolsey*, 59 U. S. (18 How.) 351.

That a stockholder of a corporation may obtain the same relief as if the suit were brought by the corporation itself, where the latter has wrongfully refused to act, see *People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738.

f. Specific Performance of Contracts.—How far a stockholder may maintain a bill for specific performance presents an interesting question. In *Collier v. Deering Camp Ground Assn.*, 23 Ky. Law Rep. 1799, 66 S. W. 183, it was held that a stockholder could not specifically enforce a contract to deliver certain stock, made between the corporation and a third person by which the former was to convey to the latter certain real estate, in consideration of a number of shares of stock in another corporation. "He was not entitled to specific performance, for he could not convey, and did not tender a deed of conveyance." A stockholder may, however, sue to enforce a contract of his corporation with another company, where the directors will not do so, the majority stockholders of the two corporations being the same, and wrongfully refusing to act on account of their own personal interests: *Pittsburg etc. Ry. Co. v. Dodd*, 24 Ky. Law Rep. 2057, 72 S. W. 822. As to what allegations are necessary in a suit by a stockholder for specific performance, see *Taylor v. Holmes*, 14 Fed. 498.

Where one corporation contracts to take over the business and assets of another, promising to issue to each of the stockholders of the latter stock in such company upon surrender of the old certificates, share for share, a single stockholder was held able to maintain a

suit for the specific performance of such contract, and his corporation is not a necessary party, the contract being with the stockholder, and no other individual having any interest in that contract: *Fletcher v. Newark Telephone Co.*, 55 N. J. Eq. 47, 35 Atl. 903.

V. Good Faith in Bringing Suit Necessary.

A stockholder in making a demand for action by a corporation, and in suing on its behalf must act in good faith: *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244; *Tervis v. Hammersmith (Ind.)*, 66 N. E. 79, 912, affirmed in 67 N. E. 672. In the former of those cases the court said: "It is a well-settled principle that whenever it is made to appear that the suit was not begun in good faith by a shareholder for the protection of his rights, but was in reality originated and prosecuted by another corporation for its own benefit, the court will consider what led the plaintiff to institute his suit, and, finding some other reason than a desire to protect stockholders' rights, will refuse to entertain the bill: *Forrest v. Manchester etc. Ry. Co.*, 4 De Gex, F. & J. 19, 65 Eng. Ch. 125; *Filder v. London etc. Ry. Co.*, 1 Hen. & M. 489; *Belmont v. Erie Ry. Co.*, 52 Barb. 637; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157; *Camblos v. P. & R. R. Co.*, 4 Brewst. 563."

VI. Parties.

a. *Corporation a Necessary Party.*—In *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244, the court quotes with approval from *Pomeroy's Equity Jurisprudence*, section 1095, where that author says: "The stockholder does not bring such suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought. He is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment, but in every other respect the action is the ordinary one brought by the corporation. It is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff." The action, then, is a representative one for the benefit of all: *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 495, 53 N. E. 520, affirming 41 N. Y. Supp. 566, 9 App. Div. 269. See, also, *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 South. 513; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. See, also, *Ex-Mission Land etc. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600.

The corporation, therefore, being vitally interested in the outcome of such suits, it is necessary that it be a party to the record, and is usually made a defendant: *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *Colquitt v. Howard*, 11 Ga. 556; *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899, affirming 22 Ill. App. 91; *Eldred v. Ripley*, 97 Ill. App. 503; *Kennebec etc. R. Co. v. Portland etc. R. Co.*, 54 Me. 173; *Cicotte v. Anciaux*,

53 Mich. 227, 18 N. W. 793; *Coxe v. Hart*, 53 Mich. 557, 19 N. W. 183; *Exter v. Sawyer*, 146 Mo. 203, 47 S. W. 951; *Gruen v. Schaeffer*, 7 Mo. App. 587; *Brewster v. Hatch*, 10 Abb. N. C. 400; *Bell v. Mali*, 11 How. Pr. 254; *Carpenter v. Roberts*, 56 How. Pr. 216; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212; *Corning v. Barrett*, 48 N. Y. Supp. 1013, 22 Misc. Rep. 241; *Bloom v. National etc. Loan Co.*, 81 Hun, 120, 30 N. Y. Supp. 700, 1 N. Y. Ann. Cas. 26; *Niles v. New York etc. R. R. Co.*, 71 N. Y. Supp. 271, 35 Misc. Rep. 69; *Langolf v. Seiberalitch (Pa.)*, 2 Pars. Eq. Cas. 64; *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244; *Forbes v. Gracey*, Fed. Cas. No. 4924, affirmed in 94 U. S. 762; *Bell v. Donohoe*, 17 Fed. 710, 8 Saw. 435; *Putnam v. Ruch*, 56 Fed. 416; *Holton v. Wallace*, 77 Fed. 61, 23 C. C. A. 71, affirming 66 Fed. 409, and the corporation must be regularly served or appear, or the court will not examine into the merits of the case: *Morshead v. Southern Pac. Co.*, 123 Fed. 350. The purpose for requiring the joinder of the corporation is that it may be concluded by the litigation, and although nominally a defendant, is really the complainant: *Carter v. Ford Plate-Glass Co.*, 85 Ind. 180; *Wilson v. American Palace Car Co. (N. J.)*, 54 Atl. 415. So, where it is made a defendant in a suit by a stockholder, it may appeal from a judgment against such stockholder, as being the party aggrieved: *Sheridan v. Sheridan Electric Light Co.*, 38 Hun, 396. A corporation, however, should not be joined as a plaintiff, against its will and without its authority: *Tennessee etc. Min. Co. v. Ayers (Tenn. Ch. App.)*, 43 S. W. 744; *Jones v. Bolles*, 76 U. S. (9 Wall.) 564.

The absolute necessity for making the corporation a party to the suit is well expressed in *Shawhan v. Zinn*, 79 Ky. 300, where it was held that it was not proper for a trial court to require the corporation to be made a party, but that the action should have been absolutely dismissed, saying: "This is not merely a defect of parties (the failure to bring the corporation before the court) to be taken advantage of by special demurrer, but the omission to make the corporation either a plaintiff or defendant leaves the stockholder without a cause of action; in other words, the party entitled to the relief is not before the court."

That the complaint is demurrable if the corporation is not made a party, see *Davenport v. Dows*, 85 U. S. (18 Wall.) 626.

Where the corporation is no longer in existence, it should not be made a party: *Putnam v. Ruch*, 54 Fed. 216. In *House v. Cooper*, 80 Barb. 157, 16 How. Pr. 292, it is held that, the corporation being a necessary party, if it is a foreign corporation, and the statutory requirements as to actions against such bodies are not complied with, no relief can be given.

b. **Stockholders and Directors as Parties.**—A single stockholder cannot sue the directors for misfeasance, whereby the corporation was injured, in his own name alone, but he must join with himself, as coplaintiffs, other interested stockholders or sue in their behalf:

McAfee v. Zettler, 103 Ga. 579, 30 S. E. 268, citing Bethune v. Wells, 94 Ga. 486, 21 S. E. 230. Where the stockholders are not numerous, it is not improper to make all of them parties: East Rome Town Co. v. Nagle, 58 Ga. 474; but where they are numerous, some may file a bill for themselves and all others similarly situated: Langolf v. Seiberlitch (Pa.), 2 Para. Eq. Cas. 64. In Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, it was held that where directors had interfered with a stockholder's rights by a violation of trust, he might bring the action in his own name, as well as on behalf of the other stockholders; and if the allegations were not sufficient to entitle the action to be considered as brought in behalf of others, its sufficiency as an action in his own behalf would not be impaired by an averment that it was brought for them as well as for himself.

In Westcott v. Minnesota Min. Co., 23 Mich. 145, in an action involving the rights of a corporation and its stockholders, it was held essential that the bill should show who the present owner of shares were, or the efforts to discover them, and should aver that it was filed on their behalf as well as of the complainants; and the fact that a person who is a proper party complainant is a nonresident of the state is not a sufficient reason for his not being joined in the suit.

While the corporation itself should be a party, directors and stockholders need not be where no relief is sought against them: Forbes v. Gracey, Fed. Cas. No. 4924, affirmed in 94 U. S. 762.

Where a majority of the stockholders of a corporation and creditors holding mortgages on its property agree to sell it for a fixed price, but others refusing to agree, they get around their opposition by an amicable foreclosure, and the minority stockholders then file a bill against the purchaser and the corporation, charging collusion in the sale, and praying that it be set aside, but not making the trustees in the mortgages or the consenting stockholders parties, the bill is defective for want of proper parties: Ribon v. Chicago etc. R. Co., 83 U. S. (16 Wall.) 446. Not only may the officers in default be made defendants, but also other parties who have participated in the wrongful acts: Slattery v. St. Louis etc. Co., 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79. That defaulting directors are proper defendants, see, also, Moyle v. Landers (Cal.), 21 Pac. 1133.

The court, having jurisdiction under a bill filed by a stockholder, can protect the rights of the trustees of a corporation the same as if they were complainants, although named as defendants: Foote v. Linek, 5 McLean, 616, Fed. Cas. No. 4913.

A person paying money to a corporation, which is misappropriated by the officers thereof, is not a necessary party to an action brought by one of the other directors against the guilty parties to account for the fund and to have a receiver appointed: Miller v. Barlow, 78 App. Div. 531, 79 N. Y. Supp. 964.

Where a stockholder sues on his own behalf only, the objection that there is a defect of parties because he is not suing also for all other stockholders similarly interested is waived if not taken by demurrer

or answer: *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Hiscock v. Lacy*, 9 Misc. Rep. 578, 30 N. Y. Supp. 860.

c. **Plaintiff's Authority to Sue Must Appear.**—In an action on a note of a corporation brought by a member thereof, he must show his right to do so, and it is not sufficient to aver that he is specially authorized to bring suit on its behalf, that being a mere allegation of law, but the nature and terms of his authority should be set forth: *Habicht v. Pemberton*, 6 N. Y. Super. Ct. (4 Sand.) 657; *Meyers v. Machado*, 13 N. Y. Super. Ct. (6 Duer) 678, 14 How. Pr. 149, 6 Abb. Pr. 198. Where, however, an officer is authorized to sue, proof of a debt due the corporation, and not the officer personally, is no variance: *Root v. Price*, 22 How. Pr. 372.

In an action by a corporation in which the complaint avers that it was commenced by minority stockholders "by express consent, direction, and authority of the corporation," a demurrer that it has no legal capacity to sue, because the suit was commenced without the authority of the directors or a majority of the stockholders, is not well taken: *Lang Syne etc. Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358.

VII. Misjoinder of Corporate and Individual Causes of Action.

Where a stockholder joins a suit on his own behalf with one on behalf of the corporation, the bill is multifarious, for such suits should be separately stated: *Scharf v. Asphalt Pav. Co.*, 5 App. Div. 439, 39 N. Y. Supp. 197, *Whitney v. Fairbanks*, 54 Fed. 985; *Church v. Citizens' St. R. Co.*, 78 Fed. 526. But where the cause of action set forth is one only existing in favor of the corporation, the fact that the stockholder has also asked for other relief to which he is not entitled does not render the bill multifarious: *De Neuville v. New York etc. Ry. Co.*, 81 Fed. 10, 26 C. C. A. 306.

In *Rennie v. Deshon*, 31 N. J. Eq. 578, a creditor of a corporation was given by the owners thereof a controlling part of the stock as security for money advanced the corporation, and one of them also assigned bonds owned by him individually, and the corporation also gave a mortgage on its works. The owners then filed a bill against the creditor, the corporation, and a bank that had discounted the creditor's notes for the corporation's benefit, praying an accounting and that the stocks and bonds be redeemed. The court held that the bill was not multifarious, as the stock of the complainants together, and the individual bonds of one of them were held as security for the same liabilities, and neither could compel a transfer of his property on payment of part only of the debt.

Where a corporation for value agrees to finance another company, which it does, the former earning large sums under the agreement which the latter refuses to pay, if the directors of the former will not sue, a stockholder thereof may pray for a receiver for his own company and an accounting from the other, and the bill states a single cause of action for an accounting: *Case v. Hudson Co.*, 41 Misc. Rep. 51, 86 N. Y. Supp. 577.

VIII. Acquiescence and Laches.

a. Participation in Wrong by Complaining Stockholder.—The acquiescence of a stockholder in the fraud of corporate officers to aid one corporation at the expense of another will not prevent recovery in an action brought by him on behalf of the corporation, in a proper case, the stockholder being only nominally the plaintiff, the action being really between the two corporations: *Fitzgerald v. Fitzgerald etc. Co.*, 41 Neb. 374, 59 N. W. 838. So it makes no difference that the complaining stockholders participated in the wrongful dividend, and they may sue without returning their share of the illegal dividend: *Appleton v. American Malting Co.* (N. J.), 54 Atl. 454. Where the officers of a corporation wrongfully sell some of its property, the purchaser thereof may be joined as a defendant without any offer of return of the purchase price being made, such party being alleged to be a co-conspirator of the directors: *Gray v. New York etc. S. S. Co.*, 3 Hun, 383, 5 Thomp. & C. 224, the court saying: "It is undoubtedly a general rule, that he who seeks to repudiate a contract with another upon the ground of fraud, must restore that which he has received. How this doctrine, however, can be made applicable in favor of this defendant, is not perceived. The complaint charges that the Old Dominion Steamship Company is co-conspirator with the other defendants to defraud the plaintiffs and those whom they represent, for its own benefit and that of its officers, as well as for the gain of the other defendants. Why should the plaintiffs be compelled to restore to it property which they do not control, and which such defendant, for the purpose of defrauding them placed in other hands? The victims of a conspiracy (and such the plaintiffs are, according to the complaint, which the demurrer admits) surely ought not to be called upon to make good to one of the conspirators that which has been parted with for the express and only purpose of working a wrong to such victim": See, also, *Edwards v. Mercantile Trust Co.*, 124 Fed. 381.

It is no objection to an action by a corporation against its directors for a breach of trust, that the corporation itself, by the use of its name, was a party to their fraud: *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 14 Abb. N. C. 103, 11 Daly, 373.

b. Laches.—Laches may be for a good defense to an action by a stockholder on behalf of a corporation, and if he sleeps on his rights, he will be barred from asserting them: *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793; *Hoyt v. Quicksilver Min. Co.*, 17 Hun, 169; *Hart v. Ogdensburg etc. R. Co.*, 89 Hun, 516, 35 N. Y. Supp. 566; *Appeal of Watts*, 78 Pa. St. 370; *Taylor v. South etc. R. Co.*, 13 Fed. 152. No distinction can be made, in considering the question of notice, between the corporation and its officers and stockholders; and it cannot be said that the officers and stockholders knew of the wrong complained of, but the corporation did not: *Pacific R. R. v. Missouri Pac. Ry. Co.*, 12 Fed. 641.

So stockholders cannot maintain a bill to redeem property from a mortgage, because the directors did not do so, twenty years afterward: *Roberts v. New York etc. R. Co.*, 31 N. Y. Supp. 577; nor can they wait thirty years before bringing a suit to correct an error in a deed: *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. Rep. 1192. For other cases in which laches was held to bar the right of action, see *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91, 45 Atl. 936; *Latimer v. Richmond etc. R. Co.*, 39 S. C. 44, 17 S. E. 358; *Edwards v. Mercantile Trust Co.*, 124 Fed. 581.

It is not laches where minority stockholders wait until the day preceding the time set for the ratification of an illegal act by a majority, before suing out an injunction to prevent it: *Forrester v. Boston etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 553. In *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 14 Abb. N. C. 103, 11 Daly, 373, the court quotes with approval from the case of *Boardman v. Lake Shore etc. R. R. Co.*, 84 N. Y. 157, where it is said: "It is not required that each particular stockholder should sue for his share of the dividends. to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that they were advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending, without incurring the hazard of losing their rights on account of the lateness of their demands."

IX. If Corporation is Barred, Stockholder is Also.

A stockholder can sue to enforce a right of the corporation, only when such body itself might do so, and if the latter is for any reason barred, the former is also. So where a corporation could not institute an independent action to enjoin foreclosure proceedings, but was bound to make use of the facts alleged by answer or cross-complaint to the action of foreclosure, a stockholder was held to have no better right: *Waymire v. San Francisco etc. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086. Nor can a stockholder sustain an action to set aside a case on a ground which the corporation itself could not maintain: *Hart v. Ogdensburg etc. R. Co.*, 89 Hun, 316, 55 N. Y. Supp. 566. An action by a stockholder is also barred by a judgment against the corporation whose rights he desires to enforce, a stockholder having no independent right of action: *Alexander v. Donohoe*, 68 Hun, 131, 22 N. Y. Supp. 652.

X. Who is a Stockholder for Purposes of Suit.

a. **Must be so in Fact.**—A stockholder, in a proper case, being entitled to vindicate corporate rights, it becomes necessary to determine who is a stockholder for that purpose. In the first place, he must be one in fact. So a party holding fictitious stock is not entitled to the rights of a stockholder: *Arkansas etc. Canal Co. v. Farmers' etc. Trust Co.*, 13 Colo. 587, 22 Pac. 954, and see *In re Gardner*, 86 Hun, 30, 33 N. Y. Supp. 326. And where a person is

only the legal, and not the equitable owner, of stock, by reason of the certificate not being surrendered and an entry of transfer made on the books of the company, he has no standing in an action to enforce equitable rights appurtenant only to the beneficial ownership of the stock: *Scanlan v. Snow*, 2 App. D. C. 137. In *Da Ponte v. Louisiana etc. Lottery Co.*, Fed. Cas. No. 3569, a purchaser of stock standing on the books of the corporation in the name of another, who held them to secure a debt due from the seller, was held unable to maintain a suit on behalf of the company, where he had no certificate, transfer, no evidence of title, and no shares set apart to him: See, also, *McHenry v. New York etc. R. Co.*, 22 Fed. 130.

No presumption arises that a stockholder continues as such, where he alleges, but does not prove, that a transfer of his stock was obtained from him fraudulently or without consideration, and it is proved that he had signed a blank power of attorney on the back of the stock certificate, which had found its way back into the company's possession and had been canceled: *Thompson v. Stanley*, 73 Hun, 248, 25 N. Y. Supp. 890.

A transferee of stock may sue to compel a corporation to record the transfer on the books of the company and issue new stock in place of the old, and in the same action enjoin a proposed illegal issue of preferred stock, which would injure his stock. "No sound principle of procedure requires that, under such circumstances, the plaintiffs should first resort to an action in equity to compel a transfer of the stock before bringing an action to enjoin an illegal issue of stock which will materially depreciate the value of their stock. If such a rule were sanctioned the unauthorized issue of stock might and ordinarily would be consummated before the stockholder could be in a position to obtain an injunction and the remedy would be utterly inadequate for the full protection of his rights": *Ernst v. Elmira etc. Imp. Co.*, 24 Misc. Rep. 583, 54 N. Y. Supp. 116.

b. *Subscriber.*—When a subscriber of stock has paid his subscription and received his certificate, he may prevent mismanagement and misapplication of corporate property, but the mere fact that the company to which he has subscribed is without authority leasing its property to another company, will not constitute a defense to the payment of the subscription, even though there be a loss in the company's earnings: *Ottawa etc. R. R. v. Black*, 79 Ill. 262, citing *Hays v. Ottawa etc. R. R.*, 61 Ill. 422. Subscribers who, without any default on the part of the corporation, fail to comply with the terms of their subscription, have no such right or interest in the stock as to entitle them to an injunction: *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

c. *Importance of Time of Becoming Stockholder.*—As a general rule, a purchaser of stock cannot attack the acts of the corporate management prior to the acquisition of his stock. "Otherwise," says the court in *United Electric Securities Co. v. Louisiana Elec. Light Co.*, 68 Fed. 673, "we might have a case where stock duly represented

in a corporation consented to and participated in bad management and waste, and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to": See, also, *Da Ponte v. Louisiana etc. Lottery Co.*, Fed. Cas. No. 3569, and *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291.

Where, in his complaint, a stockholder alleges that he "was the owner of a large amount of said stock before any of the alleged or pretended sales or transfers of property herein . . . complained of," it sufficiently sets forth that he acquired the stock before the transactions complained of: *Tevis v. Hammersmith (Ind.)*, 67 N. E. 672, affirming 66 N. E. 79, 912.

d. **Insignificant Stockholders.**—Holders of insignificant amounts of stocks do not seem to be favored in their attempts to take the control of the corporation away from a large majority. So where an act is not ultra vires, a court will not interfere at the instance of a holder of one hundred shares out of three hundred and fifty thousand, unless a clear case is made out: *Benedict v. Western Union Tel. Co.*, 9 Abb. N. C. 214. See, also, *Gruen v. Schaeffer*, 7 Mo. App. 587, and *Albers v. Merchants' Exchange*, 45 Mo. App. 206, in which latter case it was held that even though the act be ultra vires, a single minority stockholder must show that the loss sustained by him is of a substantial character; and the court quotes with approval from *Dannmyer v. Coleman*, 11 Fed. 97, where Judge Sawyer said: "It is always a suspicious circumstance where a single stockholder, among a large number of a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so, where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim 'De minimis non curat lex' very properly applicable."

JOHNSON v. WILSON.

[137 Ala. 468, 34 South. 392.]

TROVER—Essentials of.—To support an action of trover, the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion. (p. 53.)

TRESPASS—Essentials of.—In order to maintain trespass for the wrongful taking of personal property, the plaintiff must show that he had at the time of the taking the actual possession of the property or the right of immediate possession. (p. 53.)

TROVER—Burden of Proof.—If by the terms of a chattel mortgage the right of the mortgagee to take possession of the property is postponed until the maturity of the note secured by the

mortgage, he cannot maintain an action for the conversion or taking of the mortgaged property until after the law day of the mortgage, and the burden of proof is on him to show that the conversion or taking occurred after his right to take possession accrued under the mortgage. (p. 53.)

MORTGAGES—Record as Notice.—The record of a mortgage executed in the name of A. W. Dixon, is not notice to purchasers for value that J. W. Dixon executed it. (p. 54.)

TROVER—Evidence.—If in trover or trespass both parties derive title to the property from the same person by virtue of a mortgage executed by him, but the mortgage to the defendant was executed under an assumed name, his mortgage is not admissible in evidence, nor is the fact admissible that he sold the property included in the mortgage to the mortgagor. (p. 55.)

AGENCY FOR COLLECTION.—A mere collecting agent can relinquish no right of his principal, nor recognize any adverse claim so as to bind him without express authority. (p. 55.)

Kirk, Carmichael & Rather, for the appellant.

W. H. Key, for the appellee.

⁴⁷⁰ TYSON, J. The complaint contains four counts—two of them in trover and two in trespass. To support the counts in trover the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion: *Corbitt v. Reynolds*, 68 Ala. 378; *Elmore v. Simon*, 67 Ala. 526; *Booker v. Jones*, 55 Ala. 266. So, too, in order to maintain trespass for the taking of personal property the plaintiff must show that he had at the time of the taking the actual possession of it or the right of immediate possession: *Cook v. Thornton*, 109 Ala. 523, 20 South. 14.

The mortgages upon which the plaintiffs relied as ⁴⁷¹ the source of their title and upon which they predicate their right to the possession of the property, were made to secure the payment of two promissory notes, each payable on the first day of November, 1901. By their terms the right of the plaintiffs to take possession of the property was postponed until the maturity of the notes. This being true, the plaintiffs cannot maintain this action for the conversion or taking of property by defendant before the law day of the mortgage: *Elmore v. Simon*, 67 Ala. 426; *Fields v. Copeland*, 121 Ala. 644, 26 South. 491. And unquestionably the burden was upon the plaintiffs to show that the conversion or taking occurred after their right accrued to take possession under the mortgages. In other words, they must establish their right of possession of the property at the time it was converted or taken by defendant. This

they utterly failed to do. It is true, it was shown that a portion of the cotton alleged to have been converted or taken by defendant, was received by him in November, but on what day of that month is not shown. Non constat it was received by him on the first day: *Alabama Min. Land Co. v. State*, 126 Ala. 90, 28 South. 668. If so, the mortgagor had not made default since he was entitled to the whole of that day in which to discharge his debt. So, then, the plaintiffs having failed to discharge the burden of proof that was upon them, the defendant was entitled to have the affirmative charge requested by him given, and this, too, without regard to which of them had the best claim to the property.

It may be that upon another trial, the plaintiffs may prove the conversion or taking by defendant of some of the property after the law day of their mortgages. In that event, the contest will be as to which of them has the superior title to the property. Both claim to have derived their title from one J. W. Dixon, and both by virtue of mortgages executed by him. The defendant acquired his mortgage on December 10, 1900, which was filed for record on the fourteenth day of the same month. The signature to that mortgage is "A. W. Dixon," although it was in fact executed by "J. W." The plaintiffs' mortgages were executed in the spring of 1901 and executed by Dixon in his true name. It is not contended that the plaintiffs had actual notice of the defendant's mortgage ⁴⁷² or that they are not purchasers for value. The question is, Are they chargeable with constructive notice of the mortgage held by defendant by reason of its recordation?

"Conveyances of personal property to secure debts or to provide indemnity are inoperative against creditors and purchasers without notice until recorded," etc.: Code, sec. 1009. And the recording of such a conveyance in the proper office operates as notice of its contents: Code, sec. 991.

It may be, and doubtless is, true that the mortgage executed by J. W. Dixon to the defendant under the assumed name of A. W. Dixon is a valid conveyance inter partes, but it does not follow from this that the plaintiffs, who subsequently purchased it from Dixon under his true name, are chargeable with constructive notice of the mortgage which was recorded correctly. In other words, the record of a mortgage executed in the name of A. W. Dixon is not notice that J. W. Dixon executed it. The names are as entirely different as are the names of J. W. Dixon and J. W. Smith. Had Dixon assumed the name of J.

W. Smith and executed the mortgage, signing that name instead of his true name, it could hardly be doubted, although he bound himself, that the record of it would not have operated as notice to the plaintiffs: *Mackey v. Cole*, 79 Wis. 426, 24 Am. St. Rep. 728, 48 N. W. 520; *Phillips v. McKaig*, 36 Neb. 853, 55 N. W. 259.

The case of *Fincher v. Hanegan*, 59 Ark. 151, 26 S. W. 821, cited by appellant's counsel, only involved a mistake in the initial letter of the middle name of the mortgagor. In that case the mortgagor executed the first mortgage by his true Christian name and surname. The court held that the middle letter was immaterial as the law recognizes but one Christian name. It is, therefore, not an authority upon the question here involved, if abstractly sound, of which we express no opinion.

The mortgage offered in evidence by defendant was properly excluded. Nor did the court commit an error in excluding the fact that defendant sold the mule to Dixon, and that the mortgage held by him was given for the purchase price of the mule. The mortgage being inoperative as against the plaintiffs, it was immaterial ⁴⁷³ how or from whom Dixon acquired the mule. He had the title to it, and when he executed the mortgages to the plaintiffs, they, being bona fide purchasers for value, acquired the title and are entitled to recover in the action if the conversion or taking by defendant took place after the law day of their mortgages. In making this statement, we have not overlooked the contention that the plaintiff's agent consented to the taking of the property by defendant. We do not construe the testimony as showing such an assent on the part of the agent. But even if it is susceptible of such an inference, he was under the testimony, clearly without authority to make it so as to bind his principals. He was a mere collecting agent, and could relinquish no rights of theirs or recognize any adverse claim without their express authority: *Bynum v. Southern Pump etc. Co.*, 63 Ala. 462; *Mobile etc. R. R. Co. v. Cogsbill*, 85 Ala. 456, 5 South. 188.

Reversed and remanded.

The Defective Recording of legal instruments is the subject of a recent monographic note to *Koch v. West*, 96 Am. St. Rep. 397-406. The record of a chattel mortgage executed in an assumed and fictitious name does not impart notice to a purchaser who finds the mortgagor in possession: *Mackey v. Cole*, 79 Wis. 426, 24 Am. St. Rep. 728, 48 N. W. 520.

That the Mortgagee of chattels, in a proper case, may maintain an action for their conversion, see the monographic notes to *Bolling*

v. Kirby, 24 Am. St. Rep. 816; St. Mary's Machine Co. v. National Supply Co., 96 Am. St. Rep. 691. A second mortgagee of chattels, who is neither in actual possession nor entitled to such possession, cannot sue for their conversion: Baker v. Seavey, 163 Mass. 522, 47 Am. St. Rep. 475, 40 N. E. 863. In Kennett v. Peters, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999, it is held that a chattel mortgagee does not become the absolute owner upon condition broken, nor become entitled to immediate possession unconditionally; and, therefore, he cannot maintain trover for the conversion of the property, without alleging his special ownership and interest therein at the time of the conversion.

ROBERTS v. MATHEWS.

[137 Ala. 523, 34 South. 624.]

NUISANCE, Public—Right of Private Citizen to Abate.—A private individual who alleges upon sufficient facts, that he has suffered a special injury from a public nuisance which is real and distinct from that suffered by him in common with the public at large, and is so continuous in its nature that the legal remedy for damages is inadequate, is entitled to maintain suit to abate such nuisance. (p. 57.)

DEDICATION—Streets.—If a person plats land, setting apart certain portions thereof as streets, and sells lots with reference to such plat, he irrevocably dedicates the land designated thereon as streets, squares or commons, to the public for public uses. (p. 57.)

DEDICATION—Streets—School Land—Nuisance.—If school commissioners are authorized to survey, plat, and sell, state school lands, and lots are sold with reference to such plat when made, there is an irrevocable dedication to the public of streets, alleys, and public squares laid out on such plat, and the subsequent obstruction thereof constitutes a public nuisance which may be abated by a lot owner who is especially injured thereby. (p. 58.)

Bill to abate, as a public nuisance, the obstruction of streets and a public square as laid down on a plat of a town, and with reference to which the complainant purchased certain lots. He alleged that, by reason of the obstruction of such streets and square, the value of his lots was materially decreased, and that there was special injury to him by reason of the fact that he intended and desired to build a hotel on his property, and that, without the unobstructed use of such streets and the removal of the obstruction from such square, his property would be practically without value to him. Decree overruling a motion to dismiss for want of equity and overruling a demurrer to the bill. The defendants appealed.

Blackwell & Agee and Knox, Dixon & Burr, for the appellant.

E. H. Dryer, for the appellee.

⁵²⁸ DOWDELL, J. The bill in this case was filed to abate an alleged public nuisance. That courts of equity have jurisdiction in such matters is a proposition not open to question. The averments of the bill as to ownership and special damage are sufficient to authorize its maintenance by the complainant individually: *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; 9 Am. & Eng. Ency. of Law, 2d ed., 63, 64.

It is well settled by decisions of this court, that where a person plats land and lays off lots according to such plat, and makes sale of one or more of such lots with reference thereto, he irrevocably dedicates the land designated thereon as streets and alleys, highways, squares and commons to the public, for public uses: *Western Ry. of Ala. v. Alabama Grand Trunk Ry. Co.*, 96 Ala. 278, 11 South. 483; *Harn v. Dadeville*, 100 Ala. 202, 14 South. 9; *Sherer v. Jasper*, 93 Ala. 530, 9 South. 584; *Reed v. Mayor etc. of Birmingham*, 92 Ala. 348, 9 South. 161; *Evans v. Savannah etc. R. R. Co.*, 90 Ala. 54, 7 South. 758; *City of Demopolis v. Webb*, 87 Ala. 659, 6 South. 408; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289; *Douglass v. Montgomery*, 118 Ala. 607, 24 South. 745; *Avondale Land Co. v. Avondale*, 111 Ala. 527, 21 South. 318.

The land in question, which was surveyed and platted, and laid off in lots, was school land, being the sixteenth section of the township, and was so surveyed and platted for the purpose of sale by the school commissioners in 1834, under the act of January 15, 1828, and acts amendatory thereof. The contention of the appellants is, that the school commissioners, in the survey, platting and sale of said land, were without authority to dedicate any portion of the same to public highways, or other public uses.

The sale of the sixteenth section by the township trustees or school commissioners, pursuant to said act, was held valid by this court, in *Long v. Brown*, 4 Ala. 622.

The act of January 15, 1828, and acts amendatory thereof (see Aiken's Digest, 378-383), gave the township ⁵²⁹ trustees, as commissioners, the authority "to cause the sections (sixteenth) so elected to be sold, to be surveyed in such manner as they may think will command the highest price for the same, in lots which will not exceed eighty acres each, and shall cause a fair plat of the same to be made out by the surveyor, and shall fix a maximum price upon such lot or part. . . . And shall exhibit the same to any person wishing to examine the land before sale, and the said plat shall moreover be exhibited

to all persons wishing to examine the same on the day of sale." Further provisions are also made relating to the condition of sale as to payment, etc.

The trustees or commissioners were the officers or agents of the state in the sale of the land. It was made their duty to cause the same to be surveyed and platted, and to be laid off in lots in such manner "as they may think" would command the highest price, the limitation in area of the lots being upward, not to exceed eight acres each. In this they were vested with a discretion, in the exercise of which, however, it was their duty to so divide the land into lots as to make it command the highest price. If the locality was suitable for a townsite, and by a survey, platting and laying off into town lots, the highest price for the land could thereby be obtained, we think the act not only conferred the authority on the trustees to so lay off the land into lots for sale, but imposed that duty. If they had such authority, then clearly they had the implied power and authority to make each and every lot accessible by a public highway, and to that end to make a dedication of such highways to the public.

By an act of Congress the Fort Dearborn reservation was directed to be sold by the Secretary of War. No special power was given to have the land surveyed into lots in such manner as he might think would command the highest price, as was given to the trustees in the case before us under the act of January 15, 1828, yet the secretary directed his surveyors to lay out a portion of the land into town lots and blocks, with streets, highways, alleys, etc., and a plat survey was made and lots ⁵³⁰ were sold with reference to such survey and plat. The supreme court of the United States held the same to be a valid dedication of such streets, alleys, highways, etc.: *United States v. Illinois Cent. R. R. Co.*, 154 U. S. 225, 14 Sup. Ct. Rep. 1015.

Our conclusion is that the respondents' demurrer to the bill was not well taken, and the city court properly overruled the same.

Affirmed.

Dedication of Property to a public use is discussed in the monographic note to *State v. Trask*, 27 Am. Dec. 559-570, and the recent cases of *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332, 86 N. W. 882; *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88, 83 South. 825. As to the estoppel of a vendor of lots as against his grantees, to deny the dedication of strips of the tract for streets, see *Prescott v. Edwards*, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

A Public Nuisance can be abated only by a public officer, except when the party desiring to abate it has some special interest in the abatement different from, and greater than, the interest of the community: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 259; *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251, 66 Pac. 243. But if an individual suffers some particular loss or damage beyond that suffered in common with others, he has a right of action therefor: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623, 52 Am. St. Rep. 860, 34 Atl. 974; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858, and authorities cited in the cross-reference note thereto.

BETTIS v. McNIDER.

[137 Ala. 588, 34 South. 813.]

DOWER—Assignment of—Effect on Rents.—After dower is assigned the seizure of the widow relates back to the date of the death of her husband, and she is entitled to the rents of the land due before as well as after the assignment of dower. (p. 60.)

DOWER—Assignment of—Effect on Rents Transferred.—An administrator's right to the possession of the lands of his intestate is subordinate to the widow's right of dower, and he can never acquire any title as against her to the rents arising from that portion of the estate assigned as dower so as to convey a superior title thereto to another by a transfer to him of the tenant's obligation, and the widow, after assignment of dower, has a right to recover the rents received by such transferee, in an action for money had and received. (p. 61.)

W. Cunninghame, for the appellant.

Davis & Gunn, for the appellee.

591 **TYSON, J.** This is an action for money had and received, brought by plaintiff against defendant for the proceeds of the sale of five bales of cotton, received by the latter from a tenant after the plaintiff's dower in the land on which the cotton was grown had been assigned to her. Prior to the assignment of dower, the administrator rented the land, taking the tenant's obligation for the delivery of the cotton, which he transferred to the defendant. The chief important question presented is, Did the transfer of the tenant's obligation to defendant by the administrator prior to the assignment of dower operate to defeat the plaintiff's right to the rent? Prior to the assignment of dower, a widow has no such title to the land as will support an action at law against an administrator or heir for rents collected. Her

remedy in such case is in equity. And upon proper bill she may recover them of the administrator or heir from the date of the death of the husband to the date of the assignment: *Watts v. Williams*, 38 Ala. 680; *Slater v. Meek*, 35 Ala. 538; *Perrine v. Perrine*, 35 Ala. 644; *Beavers v. Smith*, 11 Ala. 32; *Tillman v. Spann*, 68 Ala. 102, 107. After assignment, the widow is invested with a life estate in the lands set apart to her: Code, sec. 1522. She immediately becomes seised for life of a freehold estate, and has the same absolute ownership and control of the lands assigned as though her title had accrued by deed or will. The assignment, however, is not a conveyance, but the dowress, by intendment of law, is in by her husband.

The only object to be accomplished by the assignment is to give the widow a right of entry and to define the boundary of her possession, the allotment conferring upon her no new right to the land. And after the dower is assigned, her seisure relates back to the date of the death of her husband, and the antecedent seisure of the heir, which took effect on the death of the husband, is considered as never having had an existence, and she is in contemplation of law the immediate successor in title of the husband: 10 Am. & Eng. Ency. of Law, 2d ed., p. 152.

In *Boyd v. Hunter*, 44 Ala. 705, upon bill filed by a widow, after dower assigned, against the administrators ⁵⁹² of her husband's estate and the tenants to whom they had rented the land prior to the allotment of dower, but whose obligation to pay the rent matured after dower was assigned, a recovery was allowed for the rents of the land collected by the administrators prior to the assignment of dower, and also for the rent falling due after the assignment. From this statement it will readily be seen that one of the questions presented was, Which of the two, the dowress or administrators, had the better right to rents accruing after the dower had been assigned? As indicated above, the decision was in favor of the widow. The court, after affirming the right of the widow to the rents collected by the administrators, said, in part, on this point: "It is further objected that Riggs and Hunter (the tenants) are liable at law, if at all, for the rents accruing after allotment of dower. These rents could certainly have been recovered in an action at law, but as the jurisdiction of equity had attached, that court will complete justice between the parties by settling a mere matter of account. . . . There would be more force in this objection if the assignment of dower per se evicted the tenant. But although as soon as the premises have been set out

and assigned to the wife, and the allotment confirmed by the court, the freehold vests in her by virtue of her husband's seizure, and her estate is a continuation of his by appointment of law, the tenant is not required to be ousted. . . . Whether or not the tenants were at liberty to relinquish possession of any part of the dower interest on its assignment, there is no evidence that they did so. They were liable for the rent, which accrued during their possession." The continuation of the possession by the tenant after the plaintiff's right of entry accrued, notwithstanding he went into possession under the administrator, converted him into a tenant of the plaintiff, and that without attornment: *Mills v. Clayton*, 73 Ala. 359. This principle in no wise conflicts with the familiar rule which prohibits the tenant from denying the title of the landlord, in any proceeding instituted by the latter, for the recovery of rent or possession, but comes within the exception that a tenant may always show that, since the inception of the lease, the title of the landlord ~~has~~ has been extinguished or has passed from him, either by his own act or by operation of law: *Davis v. Williams*, 130 Ala. 534, 89 Am. St. Rep. 55, 30 South. 488. The administrator's right to the possession of the lands of the intestate being subordinate to the plaintiff's right of dower, he could never acquire any title as against her to the rents arising from that portion assigned as dower. This being true, he was powerless to convey a superior title to the rent to another by a transfer of the tenant's obligation. Furthermore, the obligation or contract in this case shows on its face that it was given for rent of lands belonging to the estate of the plaintiff's husband. The defendant, as assignee of it, being chargeable with the knowledge of the uncertainty of the administrator's tenure, the right of the plaintiff to an allotment of dower, when assigned that she would be entitled to the possession of the land, and of the liability of the tenant to her if he remained in possession, instead of to the holder of his contract for rent, cannot invoke the benefit of the doctrine of bona fide purchaser for value. In short, whatever title the defendant took by the transfer of the rent contract, he acquired subject to be defeated by the exercise of the right of the widow to dower, and this he was bound to know. He having no enforceable demand against the tenant, no title to the cotton which he received and converted, since it belonged to the plaintiff, he is a tort-feasor. But the plaintiff could waive the tort and bring and maintain this action against him for the proceeds of the cotton received by him from its sale. He has

money which *ex aequo et bono* belongs to plaintiff: *Miller v. King*, 67 Ala. 575; *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; 2 Ency. of Pl. & Pr. 1022.

Reversed and remanded.

That a Widow is entitled to her portion of the rents and profits of the estate from the date of her husband's death up to the time when her dower is assigned, see the monographic note to *Sanders v. McMillian*, 39 Am. St. Rep. 38.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. McTYER.

[137 Ala. 601, 34 South. 1020.]

TELEPHONE COMPANIES—Negligence—Liability to Third Persons.—If telephone service has been discontinued in, and the instruments removed from, a building in which a mercantile business is carried on, and the telephone company, instead of removing its wires as suggested by the owner of the building, merely cuts them loose from the instrument, twists their ends together and leaves them dangling in the building, so that atmospheric electricity, striking them somewhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property therein, this is negligence *per se* on the part of the telephone company, and renders it liable in damages for whatever injuries may result to customers, persons and property rightfully on the premises. (p. 65.)

NEGLIGENCE—Pleading.—A complaint, though not in terms characterizing the failure to perform a plain duty as negligence on the part of the defendant, yet averring facts which constitute negligence *per se*, is sufficient as against demurrer. (p. 66.)

TELEPHONE COMPANIES—Negligence—Defense.—It being the duty of a telephone company to remove its wires from a building after the discontinuance of telephone service therein, and negligence *per se* to fail to do so, it is no defense for it in an action sounding in damages for injury to a third person resulting from such wires being negligently allowed to remain therein, that the company did all that could be done to obviate the danger of their being there. (p. 66.)

NEGLIGENCE—Evidence—Instructions.—If, in an action to recover for negligence, the evidence tends to prove the injury complained of and the casual connection between the wrong complained of and the injury sustained, a general affirmative charge in favor of the plaintiff is properly given, and a general affirmative charge in favor of the defendant is properly refused. (p. 67.)

G. H. Fearons, J. M. Falkner and R. Rushton, for the appellant.

Swanson & Clayton, for the appellee.

⁶¹¹ McCLELLAN, C. J. These may be said to be familiar facts in physics, and, therefore, within the common knowledge of mankind, and within the judicial knowledge of courts: That atmospheric electricity, or lightning, is frequently discharged from clouds and passes to the earth; that metal wires strung in the air are good conductors of electricity, much better than the air; that animal bodies, the bodies of human beings among the rest, are also better conductors than the air or than wood; that electricity so discharged in the vicinity of such wires is liable and apt to pass into them and along them to their ends, and thence through the best conductor at hand into the earth; that if a human body is in contact with the end of the wire, the current will pass through it to the ground, and that, though not in actual contact with the end of the wire whence the current must go to the ground, but near to it, the current, instead of passing through the air to the ground, will seek the ⁶¹² better conductor of the body, pass through the air to it and through it to the earth. Of course, the higher the wires extend, the nearer to the point of discharge in the air, the greater the likelihood that the current will pass into them, and the greater the extent of the wires horizontally, the more danger there is of receiving and carrying such electric currents. It may also be said to be common knowledge that where two wires are strung near to each other, within a foot or two, on poles through the air, after the manner of telephone and telegraph wires, there is a likelihood or liability that lightning, in its descent from the clouds, will strike and follow both of them to their ends, unless diverted by other more attractive conductors, and must necessarily then pass from them to the earth through the best conductor then in its general pathway.

The business of maintaining a telephone system by means of transmitters and receivers, and of poles extending many feet in the air, with wires strung upon them and extending for the transmission of words into houses, public and private, is recognized as a legitimate business. It is, too, a business of a public or quasi public nature, in that those engaged in it in a town or city, or given locality, and using public streets and roads for their lines of poles and wire may be said to be under a duty to supply telephone service within such territory to all persons who desire it and pay for it, so that a system of lines and instruments established in a community in a sense meets a public demand and conserves public convenience. If by the exercise of such reasonable precautions as a man of ordinary care

and prudence would exercise in respect of such a dangerous agent, injuries to persons and property from the conduction along the wires and into the houses of currents of atmospheric electricity may be avoided, it is the duty of companies engaged in this business to employ devices and appliances to that end. If the danger cannot be wholly avoided, due care should be taken to minimize it; and if such care is taken and there still inheres in the operation of the system a modicum of unavoidable peril to persons and property, its consequences are to be risked and submitted to in consideration of the conservation of public ⁶¹⁸ convenience to which they are necessarily incident. The business being a legitimate one, in other words, though involving peril to others, its prosecution with the care that a man of prudence would exercise in view of its character would not entail liability for injuries which may result, notwithstanding the exercise of such due care. The operation of a railway is attended with danger to the people which cannot always be guarded against; but being a legitimate business and conducive to the convenience of the public, its operation is not wrongful, it is not a nuisance; but if a railway were constructed and maintained and operated for no good purpose and subserved no proper end, it would be a nuisance, and its operators would be liable even for injuries unavoidably inflicted in its operation. And so, to take an example from our own decisions, the driving of cattle through a frequented thoroughfare may be attended with more or less danger to persons using it, but their owner has a right to drive them there in the prosecution of his business if he exercise due care to avoid injury to others, and exercising that care he will not be responsible if injury results, notwithstanding, on the principle that "for the convenience of mankind in carrying on the affairs of life, people, as they go along public roads, must expect or put up with such mischief as reasonable care on the parts of others cannot avoid": *Matson v. Maupin & Co.*, 75 Ala. 315, 321. But if a man without occasion therefor, turn vicious animals into the street, or negligently allow them to be in a street, and injury results, he will be liable, though he be guilty of no wrong or negligence while they are in the street. And the reason is plain and the same in both the instances given: The presence of the dangerous thing is not justified by any consideration of public good or convenience, its being there is itself a wrong. And so it is, and for the same reason, with lines of telephone wire. The only justification for their being carried into a building and maintained there

is the telephone service thus supplied by means of them. If they are put there not for that purpose, but for the mere convenience of the telephone company, and allowed to be in such condition as that persons and property in the building are liable to be injured by lightning gathered ^{§14} and brought into the building by them and there discharged, their mere presence is a wrong. So, when they were originally carried into the building and equipped and maintained to supply the service to the owner, but at his instance the service has been discontinued and the instruments removed, and the company, instead of then removing the wires, merely cuts them loose from the instrument, twists their ends together and leaves them thus dangling in the building so that atmospheric electricity, striking them anywhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property, this is an unpalliated wrong on the part of the company. It is the creation and maintenance of a dangerous situation without that warranting occasion for it which may exist when the wires are in use—without any occasion whatever in fact; and the company is liable in damages for whatever injuries may result to persons and property rightfully on the premises.

The facts averred in the sixth count of the complaint bring the case at bar within the category last stated. The defendant had strung its wires for a mile or more to and into the storehouse of one Thomas, and had there attached them to a telephone instrument for the purpose of supplying him with its telephonic service, had supplied him for a time and until he made known to them that he did not desire the service longer, and requested the company to take out its instrument. This the company at once did, but against the suggestion, not to say protest, of Thomas, the defendant failed to take its wires out of the house, but, cutting them loose from the instrument, twisted their ends together and left them hanging in the store. A mercantile business was being carried on in the place, and, of course, the public were invited, and were expected, and had the right, to be in there to make purchases of Thomas' wares. In view of the known capacity of these wires to collect and carry dangerous currents of atmospheric electricity into the store and there discharge them, to the deadly peril of persons in there at the time, and in view of the total absence of any occasion for the wires to be left there at all, there can, in our opinion, be no doubt that the company owed ^{§15} a plain duty not only to Thomas, but also to his customers, to remove the wires and

thereby to obviate this peril to him and to them. Nor was there any excuse or palliation for its failure to perform this duty. Its remission of it was a positive wrong committed by defendant's servant, who removed the telephone and twisted up and left the wires. No man of ordinary care and prudence would have so acted. There is not room for two reasonable conclusions as to the character of the act in respect of negligence vel non. It was negligence per se, and to be so declared as matter of law. The sixth count of the complaint, therefore, though it does not in terms characterize this failure of plain duty on the part of the defendant as negligence, avers facts which constitute negligence. The duty was owed to the plaintiff on its averment. The negligence of it resulting in her injury is actionable by her. The negligence is alleged and also her injury in consequence of it. The count sufficiently stated a cause of action. The demurrer to it was properly overruled.

The averments of this count showing defendant's said duty that it was a duty which defendant owed the plaintiff, and defendant's neglect to perform, were, considering the evidence adduced in connection with the facts to which we have adverted as being within the common knowledge of the court and jury, proved beyond controversy and adverse inference. So far as count 4 differed from count 6 in its averments, the proof failed to establish count 4, but did without conflict establish count 6; so that, upon these points of difference—which were as to the number of wires running into the store and the occasion of plaintiff being there—the plaintiff was entitled to the affirmative charge under count 6; and it follows that if the court erred in overruling the demurrer to count 4, the error was without injury to the defendant.

The demurrers to plea 2 were properly sustained. The defendant owed the duty to remove the wires not only to Thomas, but to Thomas' customers as well, and his mere consent that they might be left there was no defense to plaintiff's action.

¶ It being defendant's duty to remove the wires, it is no defense to this action, sounding in damages for injuries resulting from their being negligently allowed to remain there, that defendant did all that could be done to obviate the danger of their being there. The court, therefore, did not err in sustaining demurrers to pleas 4 and 5.

The duty to the plaintiff being alleged and proved, as also defendant's failure to perform that duty, and the proof being without conflict, the only question for the jury, assuming that

they believed the evidence as to the wires being left in the store under the circumstances detailed before them, was whether these wires inducted atmospheric electricity into the store and discharged the current upon the person of the plaintiff, and whether she was injured thereby. To say the least, the evidence was overwhelming, though not, perhaps, to the exclusion of all ground for a contrary inference, to the establishment of the injury and of the causal connection between the wrong and it. It follows that the court properly refused to give the general affirmative charge, and the affirmative charge on count 6 for the defendant. For reasons given hereinbefore in connection with what is said last above the refusal of the affirmative charge on count 4 involved no injury to the defendant.

Having, as above declared, reached the conclusion that the plaintiff was entitled to the affirmative charge on the question of negligence, it is unnecessary to discuss the refusal of the court to give charges 4, 5, 6 and 7.

We find no ground for reversing the judgment in the record, and it is affirmed.

It is the Duty of Electric Companies to exercise the utmost care to prevent injury to persons coming in contact with their wires. Whether or not this duty has been performed is ordinarily a question for the jury: Fitzgerald v. Edison Electric etc. Co., 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732, and cases cited in the cross-reference note thereto.

MCLEAN v. WRIGHT.

[137. Ala. 644, 35 South. 45.]

ATTACHMENT BONDS are Valid although the names of the obligors signed at the bottom of the bonds do not appear in the body thereof. (p. 68.)

ATTACHMENT BONDS—Defective Affidavit.—An attachment bond is not rendered invalid by reason of the fact that the affidavit upon which the writ of attachment was issued disclosed no statutory ground for the issuance of the attachment. (p. 68.)

Barnes & Duke, for the appellant.

647 **TYSON, J.** This action is brought upon an attachment bond, and seeks to recover damages for an alleged breach of it. The complaint as originally framed contained only one count. That count was amended, as was the complaint, by the addition of a second count. A demurrer to both counts was sustained, and, plaintiff declining to plead over, judgment was entered for

defendant. Appellant's counsel, in their argument, only insist upon the sufficiency of the added or second count. The bond, the foundation of the suit, is set out in full, as also is the affidavit upon which the writ of attachment was procured. In the body of the former only the name of the principal appears, and its condition is to pay all such damages as the plaintiff in this suit may sustain by the wrongful or vexatious suing out of the attachment writ, etc.

The affidavit discloses no statutory ground existing for the issuing of the attachment. The complaint, however, avers that the attachment was procured upon the filing of the bond and affidavit, and that no statutory ground existed for its issuance. It also avers the levy of the writ upon a stock of goods belonging to plaintiff, etc., to her damage, etc.

The first ground of the demurrer challenges the validity of the bond on the ground that the name of two of the defendants, who signed it as sureties, at the bottom, ⁶⁴⁸ do not appear in its body. There is no merit in this objection: *Grimmet v. Henderson*, 66 Ala. 521. Other grounds raise an objection to the validity of the bond on account of the defect in the affidavit pointed out above. It is true section 527 of the Code imposed the duty upon the officer before issuing the attachment in this case to require the plaintiff to make affidavit that one of the statutory grounds (Code, sec. 525) existed, but we apprehend that his failure to do so, or his issuance of the writ upon an affidavit not complying with the requisitions of the statute, cannot relieve the obligors on the bond, also given as required (Code, sec. 528) as the condition to its issuance of their contractual undertaking to pay plaintiff all such damages as she may sustain by the wrongful or vexatious suing out of the attachment. Their undertaking is valid and binding, although the writ may be quashed upon proper steps taken by defendant in the attachment case, unless the affidavit be amended, which can be done: Code, sec. 564. Indeed, if the statute permitted no amendment of the affidavit so as to cure the defect and the writ was void, this would not destroy the binding efficacy of the bond: *Zechman v. Haak*, 85 Wis. 656, 56 N. W. 158. As said in that case: "It was voluntarily entered into by defendant for the purpose of procuring the seizure of plaintiff's property under the writ of attachment, and it accomplished that result, to the great damage and injury of plaintiff. . . . Why should he be relieved from liability merely because the seizure of plaintiff's property be thus procured to be made was illegal? It

seems to us that such illegality is an unanswerable reason why he should be held liable." At best, the defect under our statutes, being curable by amendment, it amounts to no more than a mere irregularity, of which the defendants of course cannot take advantage: *Brown v. Tidrick*, 14 S. Dak. 249, 86 Am. St. Rep. 754, 85 N. W. 185.

On the averments of the complaint it is entirely clear that the plaintiff is entitled to recover at least nominal damages and reasonable counsel fees alleged to have been incurred by her in defending the attachment suit, which we hold is sufficiently averred.

⁶⁴⁹ We have examined the other grounds of the demurrer, and find no merit in any of them.

Reversed and remanded.

Bonds or Undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily by competent parties, upon a sufficient consideration, constitute valid common-law obligations: *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 718, 52 Pac. 28; note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 200. And an attachment bond is within this rule: *Barnes v. Webster*, 16 Mo. 258, 57 Am. Dec. 232.

In an Action on an Attachment Bond, the parties are estopped to question the regularity or lawfulness of the attachment: *Brown v. Tidrick*, 14 S. Dak. 249, 86 Am. St. Rep. 754, 85 N. W. 185; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350.

DENNIS v. MOBILE AND MONTGOMERY RY. CO.

[137 Ala. 649, 55 South. 30.]

NUISANCE, Public—Abatement by Private Individual.—The jurisdiction of equity to restrain a public nuisance at the suit of a private individual is exercised only when he has a legal right and is without other adequate remedy at law for its enforcement. Hence a bill filed by a private individual for such purpose must not only show that the complainant will sustain injury distinct from that which he will suffer in common with others, such as would furnish the basis for an action at law, but it must go further, and show that the injury from the nuisance will be irreparable, or will be such that complete compensation therefor cannot be obtained in a single action at law. (p. 72.)

NUISANCE, Public—Abatement by Private Individual.—In an action by a private individual to abate a public nuisance, the injury will be considered irreparable so as to entitle him to relief when the resulting damage will be incapable of being measured by a pecuniary standard, and when, without assistance in equity, the injured party must suffer invasion of his substantial rights without

compensation, or when if reparation were sought in the law court, the remedy would involve a multiplicity of suits by the same plaintiff. (p. 72.)

NUISANCE, Public—Abatement by Private Citizen—Pleading.—An averment by a private individual seeking to abate a public nuisance, of a mere conclusion as to inadequacy of legal remedy, or as to the irreparable character of the injury, without an averment of facts to support the conclusion is insufficient. (p. 73.)

NUISANCE, Public—Abatement by Private Individual—Remedy at Law.—Although an obstruction constitutes a public nuisance causing actionable injury to a private citizen, yet if such obstruction is permanent, and the defendant is not insolvent, and a single action at law for damages will furnish a full remedy for such injury, a resort to equity by the injured party for the mere purpose of abating such nuisance is unwarranted. (p. 74.)

O. C. Maner and A. L. Tyson, for the appellant.

J. M. Falkner and C. P. Jones, for the appellee.

654 **SHARPE, J.** In April, 1896, the city council of Montgomery adopted an ordinance embodying an agreement with the defendants, wherein it was stipulated, among other things, that the defendant, the Mobile and Montgomery Railroad Company, should erect a freight station building not less than five hundred and thirty-five feet long and two stories high, on a strip of land which extended across what had to that time been a part of Lee street at or near the north end of that street, and also to erect on the north side of the freight building and parallel therewith a passenger depot building three hundred and nine feet in length, and to maintain a private street not less than thirty-five feet wide along the south side of the freight building, so as to intersect an alley at that building's east end, and a street at its west end, and also to maintain a private street extending past and between the two buildings; and it was further stipulated that in consideration of those and other specified undertakings, Lee street should terminate where it intersects the property of the Mobile and Montgomery Railroad Company, and that the portion of it extending northward beyond that point of intersection, including the site of the proposed freight building, should be discontinued and abolished as a street.

The foregoing and some other statements to be herein made are condensed from the amended bill, including exhibits thereto, which comprise the ordinance referred to and maps of the locality. Words we use to indicate directions are to be understood as only approximately correct.

655 The bill alleges in substance that one or the other of defendants has caused to be erected a magnificent and im-

posing structure along Water street immediately at the head of Lee street along the Alabama river, known as the "Union Depot," and that one or the other of the defendants has caused to be built a two-story freight warehouse across Lee street, and that these buildings are controlled and operated by the defendant, the Louisville and Nashville Railroad Company. The map shows this union depot building occupied the site designated for the passenger depot in the ordinances mentioned, and that the freight warehouse is where, according to the ordinances, the freight building was to be. The bill further alleges in substance that the city council had no power to abolish Lee street or to authorize the maintenance of the freight building or the standing of cars in that part of the street, and that the freight building prevents Lee street from being used as a means of connection and travel from any part of the city to the union depot, and that complainant owns a lot which fronts on the west side of Lee street. We quote from the bill that this lot is "situated about six hundred feet from said union depot and is located in such manner as to make it very valuable for the purpose of a modern hotel and retail stores, and that the house now on said lot is used as a boarding-house, for the accommodation of the traveling public as well as the people residing in the city, and that by reason of said freight depot destroying the access on Lee street between the union depot and the property of complainant, travel is diverted from Lee street to the other streets, and as a result thereof complainant's property is irreparably damaged and will never be valuable for the purposes above stated as long as said depot remains across said street, and his boarding-house is now damaged in that a great portion of the traveling patronage of boarding-houses is diverted to other streets and to other boarding-houses"; and "that the loss and injury to the orator in diminishing the value of his property facing and abutting on and along said street cannot be estimated in money, nor adequately compensated for by pecuniary damages,"⁶⁵⁶ and that such occupation and appropriation by said railroad companies of said street is a daily and continuing nuisance of special and particular injury to your orator beyond the injury which the public generally has sustained thereby and now greatly injures orator, and will continue to be more injurious and damaging to him in the near future. That said structure, as well as closing up said Lee street greatly impairs not only your orator's personal right to use and enjoy the street, but the right of the general public

as well to use and enjoy the same." The bill also alleges that the freight warehouse was built "without orator's consent and without condemning or otherwise assessing the damages he has sustained," and that it is a "private nuisance, as well as an invasion of the vested rights of orator and the public generally."

The prayer for relief is in substance that defendants be enjoined from keeping in possession the part of Lee street now closed up by the warehouse and from standing cars or locomotives on or near that street, and from making other use of that street than what is reasonable in moving cars and engines, and that they be required to remove the freight depot from across the street and to abate the nuisance occasioned thereby, and for general relief.

The jurisdiction which exists in equity for the restraint of public nuisances at the suit of a private individual is not original but is supplementary, to remedies at law. It is exercised only where the individual has a legal right and is without the adequate remedy for its enforcement. Hence a bill, filed by a private individual for such purpose, must not only show the complainant will sustain injury distinct from that he will suffer in common with other members of the public, such as would furnish the basis for an action at law, but it must go further, and show that the injury from the nuisance will be irreparable or will be such that complete compensation therefor cannot be obtained in a single action at law: Wood on Nuisances, sec. 820; Pomeroy's Equity Jurisprudence, secs. 1347, 1349; Elliott on Roads and Streets, sec. 665; 14 Ency. of Pl. & Pr. 1122 et seq.; 1 High on Injunctions, sec. 739. ⁶⁵⁷ This principle also inheres in the law relating to private nuisances: Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Pomeroy's Equity Jurisprudence, sec. 1350.

The injury will be considered irreparable where the resulting damage will be incapable of being measured by a pecuniary standard, and generally where without assistance in equity, the injured party must suffer invasion of his substantial rights without compensation: Elliott on Roads and Streets, sec. 665. And there is inadequacy of legal remedy when reparation, if sought in the law forum, would involve a multiplicity of suits by the same plaintiff: Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Pomeroy's Equity Jurisprudence, sec. 248. And

also where a judgment, if obtained, would be uncollectible: High on Injunctions, sec. 717.

The averment of a mere conclusion as to such inadequacy, or as to the irreparable character of the injury, without the averment of acts to support the conclusion, is insufficient: *Kellar v. Bullington*, 101 Ala. 267, 14 South. 466; *Bolling v. Crook*, 104 Ala. 130, 16 South. 131. For an injury to real property of a permanent character, without other special damage, the depreciation of the market value of the land furnishes the measure of damages and such damages are in a case, proper in other respects, recoverable in a single action at law: *Highland Ave. etc. R. R. Co. v. Matthews*, 99 Ala. 24, 10 South. 267; *Wood on Nuisances*, 869; 3 *Sedgwick on Damages*, 8th ed., 465, 476; *Nashville v. Comer*, 88 Tenn. 415, 12 S. W. 1027; *Ottenot v. New York etc. Ry. Co.*, 119 N. Y. 603, 23 N. E. 169.

The averments of the bill concerning the adaptation of complainant's property for hotel and boarding-house purposes, and the alleged diversion of patronage from the house, go no further than to show an impairment of the property's value as resulting from the hindrance of a particular use. They raise no question as a loss of profits of business, and do not show even that the complainant is conducting the boarding-house. Besides an interference with the rights of travel common to him and the general public, alleged diminution in the property value by reason of the situation of the freight warehouse constitutes the sole basis of complainant's claim of injury.

658 If it be assumed that the city council was without power to authorize the erection of the warehouse on the site it occupies and that the same forms an obstruction in Lee street and a nuisance, public or private, causing actionable injury to complainant's property, yet the obstruction being permanent and no insolvency of defendants being shown, a single action at law for damages would furnish a full remedy for such injury, and, hence, a resort to equity for the mere purpose of abating a nuisance is unwarranted.

This case is unlike that of *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, wherein the defendant in the bill was enjoined from projecting columns of its building into the sidewalk so as to obstruct the light, air and view about the entrance of an adjoining building owned by the complainant in that suit. It is also unlike *Douglass v. City Council of Montgomery*, 118 Ala. 599, 24 South. 745,

where at the suit of one held to be an adjacent proprietor entitled to have view of and light and recreation from grounds dedicated to public use as a park, a bill was entertained to prevent the city from diverting the park to another use. That which will deprive of light, air or view about a building in the manner complained of in these two last-mentioned cases may or may not impair the value of a building thereby affected, but it may also produce and threaten damage to the form of continuous or recurrent discomfort which would be incapable of measurement by any pecuniary standard and which, therefore, could not be recovered for in an action at law. In *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, the suit was brought by the municipality and not as here by a private individual.

Complainant's lot being, according to averments of the bill, six hundred feet from the union depot, is shown by the map exhibited in the bill to be more than four hundred feet from the warehouse, which distance locates the lot southward of the warehouse, and southward of the point where Tallapoosa street, running east and west, crosses at right angles, Lee street and the streets which run next to and parallel with Lee on the east side, and those which run ⁶⁵⁹ next to and parallel with Lee on its west side. Thus, the bill discloses, that over the space between complainant's lot and the union depot and the warehouse, access to and egress from Lee street and complainant's lot, is afforded not only by way of the private streets, which defendants agreed with the city council to keep open along the warehouse, but by way of Tallapoosa street and its connections. Such being the situation of the lot, condemnation of it for purposes of the freight-house would not have been authorized by our statutes relating to the exercise of the right of eminent domain (*New and Old Decatur R. Co. v. Karcher*, 112 Ala. 676, 21 South. 825), nor has there been had or threatened such taking of or proximate injury to the lot as entitles complainant to compensation or injunctive process under the constitutional provisions relating to eminent domain: *Lewis on Eminent Domain*, sec. 134; *Buhl v. Fort St. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829; *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *McGee's Appeal*, 114 Pa. St. 477, 8 Atl. 237; *Glasgow v. St. Louis*, 107 Mo. 204, 17 S. W. 743.

The bill lacks equity and was subject to the demurrer. The sufficiency of a plea to a bill which is without equity is not

determinable. The decree overruling the demurrer to the bill will be reversed on the appeal of defendants, and in so far as a review thereof is sought on complainant's appeal the decree will be affirmed.

Tyson and Dowdell, JJ., not sitting.

A Private Individual may sue to enjoin or abate a public nuisance which causes him to suffer a special injury, different in kind and degree from that sustained by the public generally: *Kauffman v. Stein*, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *Roberts v. Mathews*, 137 Ala. 523, ante, p. 56, 34 South. 624.

An Injunction will not issue, as a general rule, when there is a complete and adequate remedy at law and the apprehended injury is not irreparable: *Brown v. Hoff*, 5 Paige, 235, 28 Am. Dec. 425; *Hine v. Stephens*, 33 Conn. 497, 89 Am. Dec. 217. As to the meaning of the term "irreparable injury," see the note to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379, and the subsequent cases of *Puckette v. Hicks*, 59 La. Ann. 901, 4 Am. St. Rep. 242, 2 South. 801; *Tree v. Larson*, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179; *Deegan v. Neville*, 127 Ala. 471, 85 Am. St. Rep. 137, 29 South. 173; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782, 53 Atl. 522. And as to its meaning when used in the law of injunction against obstructions in public streets, see *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**DENVER AND RIO GRANDE RAILROAD COMPANY v.
PETERSON.**

[30 Colo. 77, 69 Pac. 578.]

APPEAL.—A Verdict Manifestly Against the Evidence will be set aside on appeal. (p. 78.)

CARRIER—Notice to Consignee of Arrival of Goods.—One who consigns goods to himself at a place where he does not reside nor have any agent, is not entitled to notice of their arrival. (p. 82.)

CARRIER—When Becomes a Warehouseman.—When a cart shipped by railroad is destroyed by fire in the freight depot four days after reaching its destination, due notice of its arrival having been given the consignee, the liability of the railroad company, if any, is reduced to that of a warehouseman. (p. 82.)

INSTRUCTION.—A Party cannot Complain of an instruction given at his own request. (p. 82.)

CARRIER—Goods Destroyed at Destination.—In an action to recover for goods shipped by railroad and burned in the freight-house at their destination, the jury, in determining whether the consignee had ample time to remove them before the fire, may consider the length of time between their arrival and the consignee's calling for them, and that notice was at once given him of their arrival. (p. 83.)

WAREHOUSEMAN'S Liability as Affected by Capacity and Wealth.—The capacity of a warehouseman is not the true test of his liability; and the care required of him is the same, whether he is rich or poor. (p. 83.)

NEGLIGENCE.—Degrees of Negligence, such as slight, ordinary, and gross, are not recognized in Colorado. (p. 84.)

Wolcott, Vaile & Waterman and William W. Field, for the plaintiff in error.

Orr & McKesson, for the defendant in error.

TO CAMPBELL, C. J. The cause was docketed as an appeal from the county court of El Paso county. This court has

jurisdiction to review the judgment by writ of error, but not on appeal. In such circumstances our statute provides that the appeal shall be dismissed and the cause redocketed on error. Orders so providing are therefore entered: Mills' Annotated Code, sec. 388a.

The action was brought by appellee as plaintiff below to recover of the railroad company the sum of eighty-nine dollars on account of the failure by defendant to deliver to the plaintiff a certain hackney cart which defendant received from plaintiff, for the purpose of transporting the same as a common carrier for hire from some point in the east to the city of Colorado Springs. There is no question as to the delivery of the cart by plaintiff to defendant for the purpose designated, and the latter admits that it has never redelivered it to plaintiff. It justifies its failure to do so upon the ground that, through no fault of its own, the cart was destroyed in a fire which burned its freight depot at Colorado Springs in which the cart was stored. The plaintiff alleges that such fire was caused by the negligence of the defendant company. Upon the issues joined there was a judgment for plaintiff for eighty-five dollars, which the defendant has brought here for review.

Numerous errors are assigned, but the argument ⁸⁰ is confined to a discussion of the insufficiency of the evidence to show negligence and to sustain the verdict, to errors in giving and refusing instructions and to rulings upon the evidence.

The case was begun before a justice of the peace and afterward taken to the county court by appeal, where the judgment here attacked was rendered. There being no pleadings, the issues involved must be determined from an examination of the evidence and the instructions of the court. The plaintiff in his brief charges defendant with negligence in the following particulars: a. That the railroad company negligently allowed inflammable material to accumulate and remain on its right of way around its freight depot, and that sparks from one of its engines reached this material, and set fire to it, which thence spread to the freight depot, and destroyed the cart; b. That it operated one of its locomotives, which, because not properly equipped or kept in repair, emitted live sparks in passing the depot, which were allowed thus negligently to escape from the locomotive and start the fire in question; c. That its freight depot and surrounding platforms were negligently constructed so that waste and inflammable material could and did accumulate under them; d. That it negligently failed to provide any

reasonable or adequate means for extinguishing fires in its freight depot.

And in all of said particulars it was charged that the defendant did not exercise the ordinary care required of it in the circumstances of the particular case, and that such negligence, either in whole or in part, was the direct and proximate cause of the injury to the plaintiff.

1. The most important, in fact the pivotal, question in the case grows out of the assignment of the appellant that the verdict is so manifestly against the ⁸¹ credible and satisfactory evidence as to indicate bias or prejudice on the part of the jury. The established rule in this jurisdiction is that where there is substantial conflict in the testimony, the judgment of the trial court will not be disturbed. To this general rule there are well-known exceptions, as illustrated in the following cases: *Rhode v. Steinmetz*, 25 Colo. 308, 315, 55 Pac. 814; *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 558, 45 Pac. 432; *Mitchell v. Reed*, 16 Colo. 109, 26 Pac. 342, a case in which the judgment was reversed upon the same ground as here. See *Mills' Annotated Code*, 474, where a number of similar cases are collected.

One exception is that where the verdict is manifestly against the weight of the evidence, it will be set aside by the appellate tribunal. We think that the case at bar comes under this recognized exception, as the review of the only evidence which tended to establish negligence on the part of the defendant abundantly shows. The plaintiff produced two witnesses, young girls, aged ten and twelve respectively, who were in their home about four hundred feet northeast of defendant's depot, in which plaintiff's cart was stored. When the fire began, they were looking out of the window toward the depot. They testified that a few minutes before the fire broke out, locomotive No. 553 passed the freight depot, going in a northerly direction, and one of them testified that it was throwing off a good deal of smoke and she saw sparks of a fiery red color escaping from a small hole, about three-quarters of an inch wide, in the smokestack. The day was clear and bright, with a strong wind from the southwest, blowing at the rate of about fifty miles an hour. This witness testifies that she did not notice the hole very much at that time, but had noticed it about a week before, when this engine was switching in the yards. There was also testimony by three or ⁸² four of plaintiff's witnesses that they saw this particular engine in the yard at that time.

Nothing particularly attracted their attention to it that would tend to fix in their memory its number. It was merely a casual observation. Two of them testify that this engine was one which the defendant company used in hauling the regular passenger trains between Colorado Springs and Manitou, a distance of four or five miles, and that between trains it was also employed in switching in the Colorado Springs yard.

Three witnesses for plaintiff were produced who testified that about two weeks after the fire they made an examination of this engine at the town of Manitou, and there discovered, as they say, the hole in its smokestack, to the existence of which, and the escape of sparks therefrom on the day of the fire, the two little girls testified. The object of this testimony, of course, was to show negligence by the company in failing either properly to equip, or keep in repair, the smokestack of this particular engine, and that it was due to its neglect in this respect that the fire occurred, which resulted in the destruction of plaintiff's cart. The defendant produced the engineman, the fireman, and the brakeman of the Manitou passenger train, all of whom testified that locomotive No. 553 was not, on the day of the fire, in use that day, either in the yards at Colorado Springs, or between there and Manitou, but that the locomotive then used was No. 554, a companion engine of the same size, pattern, and general appearance. There was not a particle of evidence that there was any defect of any kind in locomotive No. 554. Another engineman of the company was then produced, who testified that upon the day of the fire he had charge of engine No. 553, and it was then being used between the city of Denver and Petersburg, a distance of about seventy miles north of Colorado Springs, and was there all the day, part ⁸³ of the time being used to block a crossing on the railroad track over which an attempt was made to build a street railway track. Other witnesses from the general shops of the company at Burnham, a suburb of Denver, also testified to the presence of locomotive 553 upon that particular day at or near Denver. It is a rule of the defendant company to keep a daily record of each locomotive in use upon its road. The engineman is required by these rules to make a daily report as to where he has used his locomotive, and this report is sent to the proper officer at the general shops at Burnham; and is then spread upon the proper records of the company in a book kept for that purpose. These records were produced, and they show that this engine was not in Colorado Springs between the seven-

teenth day of September and the eleventh day of October, and upon the day of the fire it was at or near Petersburg during the entire day, and at the time the fire actually was raging. Other witnesses, employes of defendant, whose duty it was to know the whereabouts of engines, testified in corroboration of the engineman of locomotive No. 553 that it was then, as he testifies, at or near Denver during the entire day of October 1st.

The question then arises, Can the testimony of plaintiff's witnesses, though positive in its character, being that of persons only casually observing the presence of an engine in the Colorado Springs yard, having no particular object in knowing what number it bore, their attention not being particularly attracted to it, and it being no part of their business to keep any trace of it, be said to be of such weight as materially to detract from the weight, credibility, and sufficiency of the evidence produced by the defendant in that behalf? Not only was the testimony of defendant's witnesses given by men who were engaged in its employment, and therefore supposed to be better informed ⁸⁴ with reference to this matter, but it was their duty, under the rules of the company, to know what locomotive was in use and where used, and to report that fact to the proper office. In the nature of things, their means of knowledge were much better than those possessed by plaintiff's witnesses. To our minds the fact was established to a moral certainty that locomotive 553 was not at Colorado Springs on the day of the fire, but that its companion No. 554 was the one which the plaintiff's witnesses then saw. When it is considered that the two locomotives were similar in size, appearance and pattern, and that plaintiff's witnesses had frequently seen No. 553 and supposed it was still in use between Colorado Springs and Manitou and in switching in the yards at Colorado Springs, it is not surprising that they mistook the engine they saw for No. 553. The mistake was not unusual or unnatural. It was common.

To this conclusion we come without discrediting in the least the good faith of plaintiff's witnesses, impugning their motives, or questioning their veracity. All reasonable men can readily see how, in the circumstances disclosed by this record, the plaintiff's witnesses honestly were, as they might very naturally be, mistaken in the supposition that they saw locomotive No. 553; and in reaching our conclusion as judges, and as weighing evidence, and ascertaining motive, we cannot lay aside our own judgment and experience as men.

The positive conviction left in our minds, after reading this record, is that locomotive No. 553 was at or near Denver at the time of the fire, and that plaintiff's witnesses were in error in saying that it was at Colorado Springs. It might be urged, however, that so far as plaintiff's rights are concerned, it makes no difference whether the sparks which caused the fire escaped from locomotive 554 or 553, and unquestionably ⁸⁵ this is true. The prejudice to the defendant, however, does not consist in the mere fact that evidence that one engine rather than another, if either, was the cause of the injury; but when it is considered that the only evidence as to any defect in defendant's locomotive which caused the fire was that concerning 553, and that there was no testimony whatever that there was any defect in No. 554; and when it is further borne in mind that plaintiff produced witnesses to testify to the existence after the fire of a hole in the smokestack of No. 553, from which other witnesses testified they saw live sparks escaping a few minutes before the fire, it becomes very apparent that such testimony as this must have been exceedingly prejudicial, if, in truth, engine 553 was not then at Colorado Springs. As we read the record, it must have been upon this testimony alone, or very largely, that the jury based its verdict that the defendant was guilty of negligence. It therefore appears that the evidence on which the jury's verdict must be upheld, if at all, is not legally sufficient for that purpose, and the verdict is manifestly against the weight of the evidence. It will not do to say that the verdict of the jury might have been the same had plaintiff's witnesses not identified the engine in question as No. 553. The inquiry is not what effect this identification actually had upon the jury, but what effect might it have had, or what effect would it naturally have upon their minds. We cannot say that they disregarded it in arriving at their verdict, but, on the contrary, it having been admitted and undoubtedly commented upon by counsel, we must suppose that it had a strong, if not a controlling, influence with them. We reverse this judgment upon the ground that the verdict is manifestly against the weight of the credible evidence and to permit the judgment to stand would, in our ⁸⁶ judgment, be a wrong to the defendant which no court should tolerate.

The equities of plaintiff's claim are not opposed to this conclusion. The destruction of his property by fire probably would not have occurred had he promptly called for, and taken, it from defendant's possession. And while this neglect on his

part does not entirely absolve defendant from liability, and its duty with respect to the care of the cart became that of a warehouseman only, still when we come to consider the duty of the court in passing on the legal right of the parties, their own conduct as bearing thereupon is not to be overlooked.

2. For the reasons given the judgment must be reversed, but in view of another trial it is necessary to notice some other errors assigned.

The instructions in the main were unusually fair to both sides. The uncontradicted testimony is that plaintiff's cart was received by defendant at Colorado Springs on the twenty-seventh day of September, 1898, and in accordance with the custom in such cases, notice of its arrival was at once given by a postal card sent to him through the United States mail. The fire occurred on the first day of October following. The plaintiff did not arrive at Colorado Springs until two days after the fire, when, upon going to defendant's depot, he himself first learned of the destruction of his property. It does not appear that he resided in Colorado Springs, or that anyone was there to act for him. He was the consignor himself, and if he did not reside at Colorado Springs, or have such agent there, he was not entitled to notice. But that is not important here, for it is clear that due notice was given to him, and that he did not, within a reasonable time after the receipt, and before the destruction of the cart, call for the same. The shipment consisted of a single item, and it would have required but a short time to remove ⁸⁷ the cart from defendant's possession. The evidence not being in dispute, the question whether, in the circumstances, the duty of defendant as a common carrier had ceased was one of law and, as such, it is clear, as a legal proposition, that defendant's liability as a common carrier ceased at the time of the fire, and whatever liability, if any, it was under, was that of a warehouseman only; and so the court, on request, should charge.

In instruction numbered 6, as given by the court, the question as to whether plaintiff had ample time for the removal of his cart was submitted to the jury to be determined by them as a question of fact. Had an instruction been requested by defendant that plaintiff did have ample time, it would have been the duty of the court to give it. The submission by the court of that question to the jury, however, was at defendant's request, and therefore it may not now be heard to complain. In this instruction the court also told the jury that, in determin-

ing what is ample time, it was their duty to take into consideration all the circumstances as they appeared in evidence; but they were not to consider the convenience of the plaintiff in that regard, or the distance that he may have been from the station of the defendant at the time of the arrival of the cart. The defendant now insists that the court committed error in telling the jury to take into consideration all the circumstances appearing in the evidence, for there were no such circumstances except those which, in the concluding sentence, the court says must not be taken into consideration at all. This criticism is not good. There were other circumstances in proof which the jury were entitled to consider, such as the length of time between the day of the arrival of the cart and the day when plaintiff called for it, and the fact that notice was at once given to him of its arrival.

⁸⁸ In the seventh instruction the court, in defining the general duty of a warehouseman, among other things, said that it extended to the conduct of his agents and employes in the handling of articles intrusted to his care, and that the jury might also consider the value of the goods with which the warehouseman was likely to be intrusted, and his capacity for burdening himself without unjustifiable expense in the construction and maintenance of buildings in which they are to be stored. The objection to this is said to be that there was no charge of negligence against the agents or employes of the defendant in handling goods intrusted to its care, and that the capacity of a warehouseman is not a test of his liability. In case of another trial it is well to avoid mention of the conduct of defendant's agents and employes in handling goods, for that is not an element in this case; and the capacity of a warehouseman is not the true test of his liability. The care required of a warehouseman is the same, whether he be rich or poor. For, if the fact that he is rich requires of him greater care than if he possessed only moderate means or is poor, then, if he were extremely poor, the care required might be such as practically to amount to nothing; and no one would claim that such an uncertain and sliding rule should be the measure of his liability.

In some of the instructions given there appears to be a recognition by the court of a distinction with respect to different degrees of negligence. Possibly this is accounted for by the fact that defendant in some of its requests committed a like error. While defendant is not for that reason in a position to complain, and, in fact, does not complain, of the distinction thus

made by the court, we deem it appropriate to say that the doctrine is firmly established in this jurisdiction that degrees of negligence such as slight, ^{so} ordinary, and gross, are not recognized, and trial courts in their instructions should not attempt to make such distinctions: *Western Union Tel. Co. v. Eyser*, 2 Colo. 141; *Colorado Cent. R. R. Co. v. Holmes*, 5 Colo. 197; *Denver Consolidated Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499; *Denver Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378; *Denver etc. R. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211.

We do not consider meritorious defendant's objections to the rulings of the trial court in admitting and rejecting evidence.

For the error pointed out, the judgment is reversed, and the cause remanded for a new trial.

Steele, J., dissents.

WHEN THE LIABILITY OF A CARRIER IS REDUCED TO THAT OF A WAREHOUSEMAN.

- I. Goods Awaiting Shipment.
 - a. When Liability as Carrier Begins.
- II. Goods Arriving at Destination.
 - a. Termination of Liability as Carrier Generally.
 - b. Arrival of Goods at Destination.
 - c. Removal or Unloading from Cars.
 - d. Storage in Depot or Warehouse.
 - e. Removal of Goods by Consignee.
 - f. Notice of Arrival of Goods.
 - g. Delay or Stoppage in Transit.
 - h. Continuance of Lien for Freight.
- III. Goods in Hands of Connecting Carrier.
 - a. Change of Liability to that of Warehouseman.
- IV. Goods Transported by Water.
 - a. Termination of Carrier's Liability.
- V. Goods Sent by Express.
 - a. Termination of Carrier's Liability.
- VI. Baggage and Effects of Passengers.
 - a. Commencement of Liability as Carrier.
 - b. Termination of Liability as Carrier.
 - c. Connecting and Intermediate Carriers.

I. Goods Awaiting Shipment.

a. When Liability as Carrier Begins.—The extraordinary liability of a common carrier begins when the shipper surrenders the entire custody of his goods, and the carrier receives complete control of them, for the purpose of shipment at the earliest practicable opportunity or in the usual course of business. As to such goods it sustains the relation of carrier, notwithstanding they may temporarily be stored in its warehouse. Its liability as a carrier is not necessarily postponed until the goods are placed on the car, vessel, or carriage,

or until the transit actually commences: *Railway Co. v. Murphy*, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; *Fitchburg etc. R. R. Co. v. Hanna*, 72 Mass. (6 Gray) 539, 66 Am. Dec. 427; *Stapleton v. Grand Trunk Ry. Co. (Mich.)*, 94 N. W. 739; *Coyle v. Western R. R. Co.*, 47 Barb. 152; *Pittsburgh etc. Ry. Co. v. Barrett*, 36 Ohio St. 498; *Watson v. Memphis etc. R. R. Co.*, 56 Tenn. (9 Heisk.) 255; *Ft. Worth etc. Ry. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21; *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264; *White v. Goodrich Transp. Co.*, 46 Wis. 493, 1 N. W. 75.

If goods are deposited in a warehouse by the carrier to wait for the usual trains, he keeps them for his own convenience in his capacity as carrier, and is liable for their loss as such: *Moses v. Boston etc. R. R.*, 24 N. H. 71, 55 Am. Dec. 222. The delivery of goods addressed to the consignee is equivalent to an express direction to ship them at once, and liability as insurer thereupon attaches: *Gregory v. Wabash Ry. Co.*, 46 Mo. App. 574. And where cattle have been placed in a railroad company's pen for immediate shipment, and part of them placed on the cars, they are in the custody of the company as carrier: *Gulf etc. Ry. Co. v. Trapwick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

The fact that a carrier is unable to put goods in transportation promptly after their delivery to it for that purpose does not prevent its responsibility from attaching. If it retains them in its warehouse for want of means to ship them, its liability as carrier attaches: *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434. And if property is delivered and received at a railroad station for immediate shipment, the liability as carrier commences, although the railroad company may not be able promptly to transport and there may be long storage before cars can be furnished, and although it is the duty of the shipper, by agreement, to load the property on the cars when furnished: *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79. When a carrier receives goods with orders to ship them immediately, but, navigation being obstructed, stores them in its warehouse, it sustains to the owner the liability of a common carrier: *Clarke v. Needles*, 25 Pa. St. 538.

One who is both a carrier and a warehouseman is liable as carrier for goods deposited in the warehouse as a mere accessory to the carriage, that is, deposited for the purpose of being carried without further orders. His liability as carrier begins from the time of the receipt of the goods: *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Wade v. Wheeler*, 3 Lans. (N. Y.) 201. When he receives freight to be forwarded, he is presumed to receive it in his capacity as carrier; and, if while awaiting transportation, he stores it in his warehouse, where it is burned without his fault, he is answerable for its value: *Ladue v. Griffith*, 25 N. Y. 364, 82 Am. Dec. 360.

But in order that the extraordinary liability of a carrier shall attach as to goods awaiting transportation, it is necessary, as a general rule, that there shall be a complete delivery of the property,

to the carrier, and that nothing remain to be done to the goods by the consignor before their transportation. Otherwise, the responsibility of the carrier is, at most, that of a warehouseman only: *Truax v. Philadelphia etc. R. R. Co.*, 3 Houst. (Del.) 238; *Judson v. Western R. R. Co.*, 86 Mass. (4 Allen) 520, 81 Am. Dec. 718; *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126; *Grosvenor v. New York Cent. R. R. Co.*, 39 N. Y. 84; monographic note to *Schmidt v. Blood*, 24 Am. Dec. 146.

When goods are delivered to a carrier but not to be shipped until others are delivered, the carrier, up to the time of the delivery of the remainder of the consignment, is liable only as a warehouseman: *Missouri Pac. Ry. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712; *Watts v. Boston etc. R. R. Co.*, 106 Mass. 466. The mere loading of cotton by a shipper on a car set out therefor on a siding where there is no station-house or agent, where no employé of the railroad company has notice that the car is ready for shipment, is not such a delivery as imposes liability on the carrier for the loss of the cotton from fire several hours before the train is due which would have transported it to its destination: *Tate & Co. v. Yazoo etc. R. R. Co.*, 78 Miss. 842, 84 Am. St. Rep. 649, 29 South. 392. Compare *Railway Co. v. Murphy*, 60 Ark. 353, 46 Am. St. Rep. 202, 30 S. W. 419. And where a shipper loads a car, and it is removed to another track, the railroad company does not become responsible as a carrier if he has not notified it of the readiness of the car for transportation, nor of the name of the consignee: *Basnight v. Atlantic etc. R. R. Co.*, 111 N. C. 592, 16 N. E. 323.

The general rule is, in cases of this class, that the railroad company does not sustain the relation of carrier to goods delivered to it to await orders from the owner for shipment. Its custody is merely that of a warehouseman: *Little Rock etc. Ry. Co. v. Hunter*, 42 Ark. 200; *Michigan etc. R. R. Co. v. Shurtz*, 7 Mich. 515; *O'Neill v. New York Cent. etc. R. R. Co.*, 60 N. Y. 138; *Schmidt v. Chicago etc. Ry. Co.*, 90 Wis. 504, 63 N. W. 1057.

If a carrier is instructed to delay the shipment of goods delivered to it for transportation, during such delay its responsibility is that of a warehouseman: *Rogers v. Wheeler*, 52 N. Y. 262.

And if the railway agent refuses to ship goods until the freight is prepaid, its custody of them, while the funds therefor are being arranged for, is held to be only that of a warehouseman: *Texas etc. R. R. Co. v. Morse*, 1 White & W. (Tex. App. Civ.), sec. 411.

The New York court of appeals sums up the question under consideration in this language: "To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier, it is essential that the property be placed in a position to be cared for, and under the contract of the carrier or his agent,

with his knowledge and consent. The liability of a railroad company as common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to the destination of the goods, or for the convenience of the owners, the liability of the company is that of warehouseman. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into its own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are in his custody, is liable only a warehouseman, and his only responsibility as carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put in *itinere*": *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79, per Justice Earl.

II. Goods Arriving at Destination.

a. **Termination of Liability as Carrier, Generally.**—It may be said, in a general way, that until a carrier's liability is terminated by the

performance of all duties as such in respect to the property intrusted to it for transportation, its rights as warehouseman cannot begin: *Grand Rapids etc. R. R. Co. v. Deither*, 10 Ind. App. 206, 53 Am. St. Rep. 385, 37 N. E. 39, 1069. And it must assume the burden of proving facts which terminate its liability as carrier: *Kirk v. Chicago etc. Ry. Co.*, 59 Minn. 161, 50 Am. St. Rep. 379, 60 N. W. 1084.

The undertaking of a common carrier includes the obligation of a safe delivery to the consignee; and its responsibility as a carrier continues until it has made an actual delivery, or done that which may be considered an equivalent to or a substitute for such delivery. He must prove some open act of delivery before his liability can be changed from that of a carrier to that of a warehouseman: *Collins v. Alabama etc. R. R. Co.*, 104 Ala. 390, 16 South. 140; *Chicago etc. R. R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317; *Segura v. Reed*, 8 La. Ann. 695.

b. *Arrival of Goods at Destination.*—The mere arrival of goods at their destination does not reduce the liability of the carrier to that of a warehouseman. Further action in the way of delivery, actual or constructive, is necessary: *Chicago etc. Ry. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Missouri Pac. Ry. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398; *Winslow v. Vermont etc. R. R. Co.*, 42 Vt. 700, 1 Am. Rep. 365. But if the consignee demands the goods immediately after their arrival, the carrier becomes liable as a warehouseman merely: *St. Louis etc. R. R. Co. v. Akers* (Tex. Civ. App.), 78 S. W. 848. And where the owner, consignee, or other person authorized to receive goods is present at the time of their arrival and has an opportunity to take them, this may be regarded as equivalent to a delivery, after which they may be considered as held by the carrier as a bailee: *Moses v. Boston etc. R. R.*, 32 N. H. 523, 64 Am. Dec. 381. After the tender of freight to a consignee, the carrier is a mere bailee: *Hull v. Missouri Pac. Ry. Co.*, 60 Mo. App. 593.

c. *Removal or Unloading from Cars.*—As we have just seen, the peculiar liability of a carrier is not terminated by the arrival at their destination of goods intrusted to it for transportation. The carrier still has complete control of the goods, and the owner is still in need of and entitled to the same protection as before. Hence, a railroad company is liable as a common carrier for freight destroyed by fire while standing unloaded in a car at its destination: *Porter v. Chicago etc. R. R. Co.*, 20 Ill. 407, 71 Am. Dec. 286. And placing the car within the freight depot does not alter the case: *Chicago etc. Ry. Co. v. Bensley*, 69 Ill. 630.

In the case of portable packages, at least, a carrier cannot terminate its responsibility, under ordinary circumstances, without removing them from the cars: *Kirk v. Chicago etc. Ry. Co.*, 59 Minn. 161, 50 Am. St. Rep. 397, 60 N. W. 1084. Perhaps where the carrier is not expected in the usual course of business to remove the freight from its car, as in the case of grain in bulk, coal, lumber, and the like, it may terminate its liability as a common carrier by delivering

the car in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business, or, if no place of delivery is thus designated or required, in the usual and customary place for unloading by consignees: *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 237, 35 N. E. 343; *Pittsburgh etc. Ry. Co. v. Nash*, 43 Ind. 423. But its liability as carrier does not cease until it places the car at a safe and convenient place for unloading: *Independence Mills Co. v. Burlington etc. R. R. Co.*, 72 Iowa, 535, 2 Am. St. Rep. 258, 34 N. W. 320. Moreover, it is believed that the carrier cannot assert its reduced responsibility, although the above cited Illinois and Indiana cases seem to lend themselves to a contrary interpretation, until the consignee has had a reasonable opportunity to remove the freight: *Missouri Pac. Ry. Co. v. Wichita Grocery Co.*, 55 Kan. 525, 40 Pac. 899, citing *Leavenworth etc. R. R. Co. v. Maria*, 16 Kan. 353; *Pindell v. Railway Co.*, 34 Mo. App. 675; *Schen v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426, 22 N. E. 1073; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266. In this Kansas case the freight in question consisted of two carloads of sugar, which were placed in the proper position for unloading on Sunday, and were consumed by fire before business hours Monday morning.

We shall see later on that there is a difference of judicial opinion on the effect of unloading freight at its destination and storing it in a warehouse in readiness for the consignee—some authorities holding that the carrier's liability as such is thereby terminated, and others holding that such liability does not necessarily then cease. Probably this diversity of opinion accounts for any discrepancy in the decisions that we are considering at this point.

Recurring to the difference in the law where the freight consists of portable packages, rather than of cumbersome and unwieldy property, we quote from *Kirk v. Chicago etc. Ry. Co.*, 59 Minn. 161, 50 Am. St. Rep. 397, 60 N. W. 1084: "We do not mean to lay down as an inflexible rule, applicable to all cases, that in order to terminate the carrier's liability the goods must be removed from the car and put into the carrier's freight-house. The nature of some kinds of goods, such as coal, lumber, and the like, precludes this. It is usual for the consignees themselves to unload and carry away these kinds of freight directly from the cars. It is also true, as suggested by defendant's counsel, that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that, under ordinary circumstances, public policy requires that it should be held the inflexible rule that in order to terminate the carrier's liability he must remove the goods from the car in which they were transported and place them for safekeeping in his freight-house. We take notice of the fact that it is the general custom to do so with this class of goods, and to

deliver them to the consignees from the freight-room, and not from the car. To allow the carrier to terminate his liability for such kinds of goods by any less formal and expressive act, would be against public policy. The unloading of cars may be, and often is, delayed for the mere convenience of the carrier; and to permit him in such cases to say that his cars constituted his warehouse for the time being, and that if the goods had been called for they would have been delivered to the consignee, and therefore he is not liable for their loss, would inaugurate a very dangerous rule."

Where the destination is a mere flag station, without any agent, depot, or warehouse, and this is known to the consignee, and is not unreasonable in view of the circumstances, the liability of a railroad company of every sort terminates with the delivery of the freight (in this case a carload of corn) in its car on a sidetrack at its destination: *South and North Alabama R. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749.

d. **Storage in Depot or Warehouse.**—There is a long line of decisions to the effect that when goods are shipped by rail and arrive at their destination within the usual time for transportation, and are there deposited or stored by the railroad company in a place of safety and held ready for delivery to the consignee upon demand, he not being present to receive them on their arrival, the company's liability as a common carrier, in the absence of a contrary custom of trade as to delivery, ceases, and its liability as a warehouseman begins: *Almand v. Georgia R. R. etc. Co.*, 95 Ga. 775, 22 S. E. 674; *Porter v. Chicago etc. R. R. Co.*, 20 Ill. 407, 71 Am. Dec. 286; *Chicago etc. R. R. Co. v. Scott*, 42 Ill. 132; *Merchants' Dispatch Trans. Co. v. Hallock*, 64 Ill. 284; *Rothschild v. Michigan Cent. R. R. Co.*, 69 Ill. 164; *Cahn v. Michigan Cent. R. R. Co.*, 71 Ill. 96; *Bansemer v. Toledo etc. Ry. Co.*, 25 Ind. 434, 87 Am. Dec. 567; *Cincinnati etc. R. R. Co. v. McCool*, 26 Ind. 140; *Mohr v. Chicago etc. R. R. Co.*, 40 Iowa, 579; *Thomas v. Boston etc. R. R. Co.*, 51 Mass. (10 Met. 472) 43 Am. Dec. 444; *Norway Plains Co. v. Boston etc. R. R.*, 67 Mass. (1 Gray) 263, 61 Am. Dec. 423; *Hall v. Boston etc. R. R. Co.*, 96 Mass. (14 Allen) 439, 92 Am. Dec. 783; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 452; *Gashweiler v. Wabash etc. Ry. Co.*, 83 Mo. 112, 53 Am. Rep. 558; *Buddy v. Wabash etc. Ry. Co.*, 20 Mo. App. 206; *Hillard v. Wilmington etc. R. R. Co.*, 51 N. C. (6 Jones) 343; *Wardlow v. South Carolina R. R. Co.*, 11 Rich. (S. C.) 337; *Butter v. East Tennessee etc. R. R. Co.*, 76 Tenn. (8 Lea) 32; *East Tennessee etc. R. R. Co. v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902, 20 S. W. 812. Many of the above cases, those of Massachusetts and Tennessee, for example, are authority for the proposition that the mere storage of the goods without affording the consignee a reasonable opportunity to remove them, absolves the carrier from his extraordinary liability: See, also, the monographic note to *Schmidt v. Blood*, 24 Am. Dec. 147, 148.

a Removal of Goods by Consignee.—However, merely placing the goods in storage at their destination does not, in our opinion, reduce the carrier's liability to that of a warehouseman. Its liability as carrier continues, according to the sounder reason and the weight of authority, until at least such time as the consignee has had a reasonable opportunity to inspect the goods and take them away in the usual course of business: *Graves v. Hartford etc. Steamboat Co.*, 38 Conn. 143, 9 Am. Rep. 369; *Leavenworth etc. R. Co. v. Maria*, 16 Kan. 333; *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush, 468; *Bell v. St. Louis etc. R. R. Co.*, 6 Mo. App. 363; *Morris etc. R. R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215; *Moses v. Boston etc. R. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381; *Blumenthal v. Brainerd*, 38 Vt. 413, 91 Am. Dec. 350; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 778; *Parker v. Milwaukee etc. Ry. Co.*, 30 Wis. 689. This doctrine applies both to carriers by rail and to carriers by water. But the consignee must act with reasonable expedition. If he fails within a reasonable time and after a fair opportunity to take charge of the goods, the carrier's liability becomes that of a warehouseman only: *Mobile etc. R. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Western Ry. Co. v. Little*, 86 Ala. 159, 5 South. 563; *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343; *Union Pac. Ry. Co. v. Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639; *Derosia v. Winona etc. R. R. Co.*, 18 Minn. 133; *Goodwin v. Baltimore etc. R. R. Co.*, 58 Barb. 195; *Tarbell v. Royal Ex. Shipping Co.*, 110 N. Y. 170, 6 Am. St. Rep. 350, 17 N. E. 721; *Draper v. Delaware etc. Canal Co.*, 118 N. Y. 118, 23 N. E. 131; *Missouri Pac. Ry. Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349.

What is a reasonable time for the removal of goods by the consignee from a station or warehouse after their arrival is a question of fact, under all the circumstances, for the jury to decide, unless the facts are undisputed, and then it is a question of law for the court: *Laporte v. Wells, Fargo & Co.*, 48 N. Y. Supp. 292, 23 App. Div. 267; *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143. It is such a time as would give one residing in the vicinity of the place of delivery, and informed of the usual course of the carrier's business, a suitable opportunity within business hours to come and inspect the goods and take them away: *Derosia v. Winona etc. R. R. Co.*, 18 Minn. 133. In determining the question the convenience or necessities of the consignee, and the proximity or remoteness of his residence or place of business from the depot are not to be taken into consideration: *Columbus etc. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471. And he cannot defer taking the goods in order to attend to his other business. He must act promptly after notice of their arrival: *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 223. Failure to remove them for two days after knowledge of their arrival, because of inability to secure the services of city draymen, exonerates the carrier from liability for their ac-

cidental destruction by fire: *Chalk v. Charlotte etc. R. R. Co.*, 85 N. C. 423.

Three days is held to be a reasonable length of time for removal in *Columbus etc. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471. See, too, the principal case, ante, p. 76. And the failure to remove goods one week after notice of their arrival raises a presumption that the carrier's liability has changed to that of a warehouseman: *Anniston etc. R. R. Co. v. Lebetter*, 92 Ala. 326, 9 South. 73. A much greater time under some circumstances would not be unreasonable: *Wilson v. California etc. R. R. Co.*, 94 Cal. 166, 29 Pac. 861. Under the California statutes, if freight is unloaded and stored in the warehouse, the consignee having notice of its arrival, and is burned that night, the carrier's character in respect thereto is that of a warehouseman: *Hirshfield v. Central Pac. R. R. Co.*, 56 Cal. 484.

Where the consignee takes part of the goods, he has a reasonable time in which to remove the residue: *Schen v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426, 22 N. E. 1073. But if he removes part of them at the time of their arrival, and leaves the remainder for six days, the liability of the carrier as such ceases: *Welch v. Concord R. R.*, 68 N. H. 206, 44 Atl. 304. And if on the day of their arrival he takes away some of them, and puts the rest in one of the carrier's buildings, the carrier is not liable for their destruction by fire: *Stapleton v. Grand Trunk Ry. Co. (Mich.)*, 94 N. W. 739.

And when, by agreement with the consignee and for mutual convenience, the carrier stores goods at their destination in its freight-house, for the night, and they are destroyed by fire without its fault, it is not liable: *Fenner v. Buffalo etc. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

Misinformation given by a carrier or his agents to the consignee as to the arrival of goods, which prevents their removal, binds the carrier, and makes him liable for their value if they are thereafter lost or destroyed: *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143. See, in this connection, *Union Pac. Ry. Co. v. Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639; *Railroad Co. v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902, 20 S. W. 812. If, through the negligence of a carrier's servants, goods are not delivered to the consignee when called for by him, and they are afterward destroyed in the freight department, the carrier is liable for the loss: *Meyer v. Chicago etc. Ry. Co.*, 24 Wis. 566, 1 Am. Rep. 207.

In case the consignee refuses to accept the goods when tendered to him, the stringent liability of the carrier cannot be continued. Thereafter it is liable as a warehouseman only: *American Sugar Refining Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383. See, also, *Landsberg v. Dinsmore*, 4 Daly (N. Y.), 490; *Gulf etc. Ry. Co. v. North Texas Grain Co. (Tex. Civ. App.)*, 74 S. W. 567. In the last case, after the refusal of the consignee to receive the freight, and the failure of the parties to direct the disposition of it, the carrier, there being

no storage facilities at the place of consignment, transported it some fourteen miles and there stored it, where it was damaged by an unprecedented storm. The carrier was held not liable. In *Frederick v. Louisville etc. R. R. Co.*, 153 Ala. 486, 31 South. 908, it was held that where goods are destroyed in the depot by fire two weeks after their arrival, but the carrier had refused to deliver them unless the consignee would accept all of them, which he refused to do because some were damaged, the action for their value should be against the carrier as warehouseman.

1. **Notice of Arrival of Goods.**—When a railroad company or other common carrier receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him a reasonable opportunity to remove them, its duty and obligation as a carrier are at an end; and if the goods are left in its custody, its liability for subsequent loss or damage is that of a warehouseman only: *Kennedy Bros. v. Mobile etc. R. R. Co.*, 74 Ala. 430; *Collins v. Alabama etc. R. R. Co.*, 104 Ala. 390, 16 South. 140. Having unloaded the goods, stored or put them in a safe place, notified the consignee of their arrival, and given him a reasonable time for their removal, its liability as a carrier cannot be prolonged by his failure to take them into his possession and under his control: *New Albany etc. R. R. Co. v. Campbell*, 12 Ind. 55; *Stowe v. New York etc. R. R. Co.*, 113 Mass. 521; *Pindell v. St. Louis etc. Ry. Co.*, 41 Mo. App. 84; *Grieve v. New York etc. R. R. Co.*, 49 N. Y. Supp. 949, 25 App. Div. 518.

But there are many authorities holding that the carrier is not required, in the absence of custom or usage, to give the consignee notice of the arrival, in order to reduce its liability to that of a warehouseman: *Southwestern R. R. Co. v. Felder*, 46 Ga. 438; *Georgia etc. Ry. Co. v. Pound*, 111 Ga. 6, 36 S. E. 512; *Merchants' Dispatch etc. Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Chicago etc. Ry. Co. v. Kendall*, 72 Ill. App. 105; *Bansemer v. Toledo etc. Ry. Co.*, 25 Ind. 434, 7 Am. Dec. 367; *Francis v. Dubuque etc. Ry. Co.*, 25 Iowa, 60, 95 Am. Dec. 769; *Spears v. Spartenburg etc. Ry. Co.*, 11 S. C. 158. So far as this rule permits the carrier to escape responsibility as such merely by storing the goods, without giving any notice to the consignee, as seems to be the holding of some of the courts, those of Georgia, Illinois, and Indiana, for example, it is hardly defensible. Clearly, if no notice is given, it is not unreasonable to hold the carrier to its stringent liability until the consignee has had a reasonable time to take charge of the goods: *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, 50 S. E. 143; *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. 396, Fed. Cas. No. 12,266. The reasonable time, under this theory, begins to run notwithstanding no notice is given: *Columbus etc. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471.

A still more satisfactory doctrine, to our mind, is that the liability as carrier continues until the consignee has been notified of the ar-

rival of the goods, and has had a reasonable time in the common course of business to take them away after such notification: *Railway Co. v. Nevill*, 60 Ark. 375, 46 Am. St. Rep. 208, 30 S. W. 425; *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Buckley v. Great Western Ry. Co.*, 18 Mich. 121; *Faulkner v. Hart*, 82 N. Y. 413, 57 Am. Rep. 574. In the last case Justice Miller says: "It is his duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered the goods, or offered to deliver them, to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of, or to remove them." Again, in *Fenner v. Buffalo etc. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709, Commissioner Earl says: "If the consignee is present upon the arrival of the goods, he must take them without reasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe, will be found consonant with public policy, and sufficiently convenient and practicable."

In California a carrier, in order to reduce his responsibility to that of a warehouseman as to freight stored at its destination, must give notice to the consignee: *Wilson v. California etc. R. R. Co.*, 94 Cal. 166, 29 Pac. 861. And a carrier's liability as such is not terminated by the fact that goods have not for two or three weeks after their arrival been called for, if the consignee has not had notice thereof, such notice, in fact, being given to a person who fraudulently personated the consignee: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

A statute providing that a carrier can change its character to that of a warehouseman on the arrival of goods in a city or town of two thousand inhabitants only by giving a certain notice, does not make any distinction between incorporated and unincorporated cities and towns: *Louisville etc. R. R. Co. v. Johnson*, 135 Ala. 232, 33 South. 661.

Notice of the arrival of freight given to a third person, when consigned with instructions to notify him, is sufficient to exonerate the carrier from his rigorous responsibility: *Collins v. Alabama etc. R. R. Co.*, 104 Ala. 890, 16 South. 140. But notice given to one fraudulently personating the consignee will not suffice: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

Of course, want of notice to the consignee may be excused if his whereabouts or residence is unknown, and a reasonable attempt is made to ascertain the same, but without success. Then the carrier's liability, upon the storage of the goods and the lapse of a reasonable time thereafter, changes to that of a warehouseman: *Pelton v. Rensselaer etc. R. R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568.

In Illinois, where notice of the arrival of goods is not essential to the termination of a carrier's liability, it is held that when notice is given requiring the removal of freight within twenty-four hours, it does not follow that the responsibility as carrier continues for that time: *Richards v. Michigan Southern etc. R. R. Co.*, 20 Ill. 405.

When goods arrive at their destination out of time, the carrier must notify the consignee, or make a diligent attempt to, if he would reduce his liability to that of a warehouseman. This is so held in a jurisdiction where, under ordinary circumstances, the liability as carrier may be terminated without notice to the consignee: *Frank v. Grand Tower etc. Ry. Co.*, 57 Mo. App. 181.

g. Delay or Stoppage in Transit.—If property is ready for shipment and the carrier is about to take it away, but the shipper requests that the car remain until he can see the person to whom he has sold the property, the carrier's liability, during the detention, is that of a warehouseman only: *St. Louis etc. R. R. Co. v. Montgomery*, 39 Ill. 336. And where the shipper orders goods to be stopped in transitu, and to be held for him on arriving at their destination, the contract of carriage ends, and the liability as warehouseman begins, on their arrival: *MacVeigh v. Atchison etc. R. R. Co.*, 3 N. Mex. 327, 5 Pac. 457. But when a carrier deposits property in its warehouse at some intermediate place in the course of its route, for its own convenience, its duty as carrier is not ended: *Ladue v. Griffith*, 25 N. Y. 364, 82 Am. Dec. 360.

h. Continuance of Lien for Freight.—A railroad company is not necessarily responsible as a carrier during the whole time of the existence of its lien for freight on goods transported. Its liability as carrier may be terminated without its lien being destroyed: *Spears v. Spartanburg etc. R. R. Co.*, 11 S. C. 158.

III. Goods in Hands of Connecting Carrier.

a. Change of Liability to that of Warehouseman.—When there is a shipment of goods over a route or line of transportation made up of two or more connecting carriers, the contract of the parties contemplates, and it is the policy of the law, that the relation of carrier shall continue in respect to the goods throughout their transportation, and not at any time, under ordinary circumstances, be reduced to that of warehouseman. Under an "arrangement for a continuous line and joint or through rates it is the duty of the first or receiving carrier, on receiving goods for carriage to any point on the continuous line beyond its own line to carry them with due dispatch to the end of its line, and there deliver them to the next

carrier, whose duty it is to receive them and carry them with due dispatch to their place of destination, and deliver them to the owner or consignee, or, if the place of destination be beyond its own line, to deliver them at the end of its line to the next carrier, to which a like duty will then attach. In such case, the owner, by delivering his goods to be carried through, does not contemplate nor make a contract for storage. His contract is for carriage, and, until the goods reach their final destination, he has a right to a continuous carrier's duty and responsibility, which cannot, without his consent, be changed to the duty and responsibility of a warehouseman, however convenient that might be for the carrier. And, from the time its duty of carrier attaches, any carrier in the line can discharge itself of responsibility as such only by performing its full duty by carrying the goods, and delivering them to the next carrier if they are to go beyond its line. The responsibility of the preceding carrier does not cease until the responsibility of the next one attaches. Any other rule would make any arrangement for a continuous line and through rates a snare to the public": *Wehmann v. Minneapolis etc. Ry. Co.*, 58 Minn. 22, 59 N. W. 546, per Chief Justice Gilfillan.

So long as a connecting or intermediate carrier holds goods, either on his vehicles or in his warehouses, for delivery to a succeeding carrier, he holds them as a carrier, and not as an ordinary bailee; and although the succeeding carrier refuses or unreasonably delays to receive them, the first carrier continues to hold them as carrier until he does some unequivocal act indicative of a purpose to change his office. Storing the goods in a warehouse at the end of his line to await the pleasure or convenience of the next carrier does not change the character of the bailment. To exonerate himself as insurer, he must in some way clearly indicate his renunciation of the relation of carrier: *Illinois Cent. R. R. Co. v. Mitchell*, 68 Ill. 471, 18 Am Rep. 564; *Grand Rapids etc. R. R. Co. v. Diether*, 10 Ind. App. 206, 58 Am. St. Rep. 385, 37 N. E. 39, 1069; *Bancroft v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 262, 29 Am. Rep. 482; *Lawrence v. Winona etc. R. R. Co.*, 15 Minn. 390, 2 Am. Rep. 130; *Irish v. Milwaukee etc. Ry. Co.*, 19 Minn. 376, 18 Am. Rep. 840; *Bennitt v. Missouri Pac. Ry. Co.*, 46 Mo. App. 656, 670; *Mills v. Michigan Cent. R. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 594; *Conkey v. Milwaukee etc. Ry. Co.*, 31 Wis. 619, 11 Am. Rep. 630; *Texas etc. Ry. Co. v. Clayton*, 173 U. S. 348, 19 Sup. Ct. Rep. 421.

"In such cases," says Justice Davis, "it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the states of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of

commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of carrier, will not change or even modify his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation toward them": *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

"We think these cases," says Justice Cooley, "lay down a rule which is just to shippers of goods, and not unreasonably burdensome to carriers. The shipper delivers his goods to a carrier who becomes insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon someone during the whole period. The duty of one is not discharged until it has been imposed upon the succeeding carrier; and this is not done until there is a delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of business, is equivalent to a tender of delivery": *Condon v. Marquette etc. R. R. Co.*, 55 Mich. 218, 54 Am. Rep. 367, 21 N. W. 321.

If a connecting carrier would escape the rigorous liability imposed by law upon common carriers, he must, then, make a delivery of the goods, to the succeeding carrier, or do that which may be considered an equivalent or substitute therefor: *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 598; *McDonald v. Western R. R. Co.*, 84 N. Y. 497; *Dunson v. New York Cent. R. R. Co.*, 8 Lans. (N. Y.) 265. "What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformably with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second

carrier begins where that of the first ends: *Van Stanvoord v. St. John*, 6 Hill (N. Y.), 157; *Mills v. Michigan Cent. R. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152. In *Insurance Co. v. Wheeler*, 49 N. Y. 616, where connecting carriers had, at the point of connection, a warehouse used in common for the transfer of goods from one line to the other, the expenses of handling being paid in common, it was held that the delivery of goods there by one carrier, with notice to the other of their arrival and ultimate destination, placed them in possession of the latter, and subjected him to responsibility as a carrier. In *Converse v. Norwich etc. Transp. Co.*, 33 Conn. 166, a railroad company and a steamboat company had a covered wharf in common, at their common terminus, and it was the established usage of the steamboat company to land goods for the railroad on the arrival of its boats at night upon a particular place on the wharf, whence they were taken by the railroad company at its convenience, for further transportation. There was no evidence of an actual agreement that the goods thus deposited were in the possession of the railroad company, but the court was of the opinion that there was a tacit understanding that the steamboat company should deposit its freight at that particular place, and that the railroad company should take it hence at its convenience. It was held that a deposit of goods accordingly by the steamboat company was a sufficient delivery to the railroad company, and a recovery for the loss of the goods was reversed. In *Pratt v. Railway Co.*, 95 U. S. 43, the Michigan Central Railroad Company and the Grand Trunk Railway Company used a freight depot of the former, and when goods were deposited by the latter in a certain part of the depot, destined over the road of the former, they were set apart by the employes of the latter; and, after they were so placed, the employes of the Grand Trunk Railway did not further handle them. After being so set apart, the Michigan Central Railroad Company would obtain from the Grand Trunk Railway Company a list describing the goods and their ultimate destination, and make out a waybill for their transportation over its own road. Certain goods which had thus been set apart for transportation over the line of the Michigan Central Railroad Company were burned before they were loaded into its cars, but after it had obtained the descriptive list. It was held that there had been a delivery to the Michigan Central: *Texas etc. Ry. Co. v. Clayton*, 84 Fed. 305, 28 C. C. A. 142.

It is said that a connecting carrier is bound only to use reasonable diligence to secure further transportation by tendering the goods to the succeeding line, and, if acceptance is refused, then to notify the consignor or consignee, without unreasonable delay, and store or otherwise take care of the goods while awaiting instructions. Having done this, his liability as carrier ceases, and his responsibility as a warehouseman begins: *Boston v. Pennsylvania R. R. Co.*, 119 Fed. 808, citing *Johnson v. Railroad Co.*, 35 N. Y. 610, 82 Am. Dec. 416; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394. Its

renunciation of the relation of carrier is often shown by a connecting carrier, when the succeeding carrier unreasonably delays to receive the goods, by giving notice to the succeeding carrier that the goods will be kept or stored at its risk until compliance with the request to remove them; *Reiss v. Texas etc. Ry. Co.*, 98 Fed. 538, 39 C. C. A. 149.

IV. Goods Transported by Water.

a. **Termination of Carrier's Liability.**—When goods transported by water reach their destination, the carrier's responsibility as such ordinarily continues until the consignee has notice of the arrival of the goods and a reasonable time and opportunity to accept and remove them: *Graves v. Hartford etc. Steamboat Co.*, 38 Conn. 143, 9 Am. Rep. 369; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Solomon v. Philadelphia etc. Steamboat Co.*, 2 Daly (N. Y.), 104. Delivery of the goods on the wharf, without a tender or notice, is not sufficient to exonerate the carrier: *Hemphill v. Chenie*, 6 Watts & S. 62; *Eagle v. White*, 6 Whart. 505, 37 Am. Dec. 434. Compare *Cope v. Cordova*, 1 Rawle, 203. And while placing the goods on the wharf at a seasonable time and upon notice to the consignee may discharge the carrier from its stringent liability in many cases, yet the rule should not be enforced too rigorously: *Segura v. Reed*, 3 La. Ann. 695; *Redmond v. Liverpool etc. Steamboat Co.*, 46 N. Y. 578, 7 Am. Rep. 390; *Salmon Falls Mfg. Co. v. Tangier*, 3 Ware, 110, Fed. Cas. No. 12,267; *De Gran v. Wilson*, 17 Fed. 698; *Richardson v. Goddard*, 23 How. 28.

If the carrier would reduce his liability to that of a warehouseman, he must, if practicable, give the consignee notice of their arrival: *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541; except where it is the uniform custom not to: *Turner v. Huff*, 46 Ark. 222, 55 Am. Rep. 580; or where it has been the accustomed course of dealing for the consignee to call daily and receive goods daily: *Russell Mfg. Co. v. New Haven Steamboat Co.*, 52 N. Y. 657. And the carrier must, moreover, give the consignee a reasonable time to take charge of the goods: *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *The St. Laurent*, 7 Ben. 7, Fed. Cas. No. 12,231; and, in unloading them on the wharf, it must place them so that they can be removed with reasonable convenience: *Goodwin v. Baltimore etc. R. R. Co.*, 58 Barb. 195.

But the consignee cannot unreasonably prolong the extraordinary liability of the carrier. If he fails to take away the goods after notice of their arrival, and after having had a reasonable time and opportunity for taking possession of them, the carrier's liability becomes reduced to that of a warehouseman: *Labar v. Taber*, 35 Barb. 305; *Brand v. New Jersey Steamboat Co.*, 30 N. Y. Supp. 903, 10 Misc. Rep. 128; *Wynantskill Knitting Co., v. Murray*, 36 N. Y. Supp. 26, 90 Hun, 554; *The Richard Winslow*, 67 Fed. 259; *The Titania*, 124 Fed. 975. If the consignee requests that the carrier keep the goods

until demanded, its liability is changed to that of a warehouseman: *National Line Steamship Co. v. Smart*, 107 Pa. St. 492. And when goods are transported under a special contract that they remain on board for ninety days after arriving at their destination, a refusal by the consignee to receive them puts an end to the carrier's liability as such: *Hathorn v. Ely*, 28 N. Y. 78.

The law governing the termination of the liability of a carrier by water is stated by the New York court of appeals in this language: "The general principle that the duty and obligation of a common carrier by water does not, ipso facto, cease on the unloading of goods from the ship and their deposit upon the wharf, and especially where the place of discharge is also the terminus of the particular voyage, is the settled doctrine of this court and the generally accepted doctrine of the maritime law. The obligation of the ship owner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will discharge the carrier may be constructive and not actual. To constitute a constructive delivery the carrier must, if practicable, give notice to the consignee of the arrival, and when that has been done and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier as such terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option, or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer is by such failure terminated": *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 6 Am. St. Rep. 350, 17 N. E. 721, per Justice Andrews. See, also, *Miller v. Steam Navigation Co.*, 10 N. Y. 481; *King v. New Brunswick Steamboat Co.*, 73 N. Y. Supp. 999, 86 Misc. Rep. 555.

V. Goods Sent by Express.

a. **Termination of Carriers' Liability.**—The liability of express companies as to goods arriving at the point of destination differs from that of railroad companies and carriers by water, in that actual delivery to the consignee is usually necessary to the termination of their responsibility as common carriers, whereas in the case of other carriers a constructive delivery by storage and opportunity to remove the goods is sufficient. "As to express companies, the rule seems to be well settled that, generally, they are required to deliver the goods or packages to the consignee at his residence or place of business. But this rule has received modification where the place of delivery is at small way stations, where the business will not justify the keeping of special delivery messengers and wagons, in which case

personal notice of the arrival of the goods or packages, and depositing them in a safe receptacle, if that be the known custom of the company, will be treated as a delivery, when the consignee has had a reasonable time, after such notice, to remove the goods or receive the packages": *Southern Express Co. v. Holland*, 109 Ala. 562, 19 South. 66. To the same effect, see *Baldwin v. American Exp. Co.*, 23 Ill. 197, 74 Am. Dec. 190; *American Exp. Co. v. Baldwin*, 26 Ill. 504, 79 Am. Dec. 389; *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *Witbeck v. Holland*, 38 How. Pr. 273.

However, the duty of the express company to deliver and the duty of the consignee to receive are reciprocal. The liability of the company as carrier ends if the consignee is absent, and his whereabouts or place of business or residence cannot, after diligent inquiry, be ascertained: *Adams Exp. Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582. And its liability as carrier is terminated if the consignee requests that the goods be kept until the next day: *Southern Exp. Co. v. Holland*, 109 Ala. 362, 19 South. 66; or if the consignee refuses to receive the goods: *Kremer v. Southern Exp. Co.*, 46 Tenn. (6 Cold.) 356.

When goods are sent C. O. D., the obligation of the express company is safely to carry them to their destination, notify the consignee of their arrival and to offer delivery upon payment of the amount due; and when such duty is fully performed, its liability as a common carrier terminates: *Hasse v. American Exp. Co.*, 94 Mich. 133, 34 Am. St. Rep. 328, 53 N. W. 918. If the goods are tendered to the consignee and payment demanded, but after a reasonable time he fails to pay the charges and receive the goods, the express company thereafter becomes a warehouseman in respect to its duty and obligation: *Weed v. Barney*, 45 N. Y. 544, 6 Am. Rep. 96; *Grossman v. Fargo*, 6 Hun, 310. If the consignor, upon learning of the consignee's refusal to accept the goods, notifies the company to hold them until the consignor calls for them, the liability to him becomes that of a warehouseman: *Byrne v. Fargo*, 73 N. Y. Supp. 943, 36 Misc. Rep. 543.

VI. Baggage and Effects of Passengers.

a. **Commencement of Liability as Carrier.**—The exact time at which a carrier becomes responsible as insurer for the baggage of a passenger is not easy to determine. It is clear, however, that such responsibility is not necessarily postponed until actual transportation begins, but that it attaches to baggage delivered at the station at such a time before the starting of the train as shall give the owner a reasonable opportunity to obtain his ticket, check his baggage, and the like: *Goldberg v. Ahnapsee etc. Ry. Co.*, 105 Wis. 1, 76 Am. St. Rep. 899, 80 N. W. 920. The liability as a common carrier attaches to baggage at the time of its delivery, when it is received, not for storage, but for transportation in the usual course of business: *Shaw v. Northern Pac. R. R. Co.*, 40 Minn. 144. 41 N.

W. 548. And it is not necessary to the commencement of the liability, that the owner shall have placed himself in such a position that he cannot withdraw his baggage: *Green v. Milwaukee etc. R. R. Co.*, 41 Iowa, 410.

But baggage received by a carrier for the accommodation or convenience of an intending passenger, at an unreasonable period of time before passage is to be taken, is held in the capacity of warehouseman only: *Little Rock etc. Ry. Co. v. Hunter*, 42 Ark. 200; *Illinois Cent. R. R. Co. v. Tronstine*, 64 Miss. 834, 2 South. 255. This rule finds illustration where baggage is brought to a depot under the impression that it can be carried by the first train, but upon learning that it must await the departure of a later train, the owner leaves it for such train: *Goodbar v. Wabash Ry. Co.*, 53 Mo. App. 434; and where the owner leaves his trunks with the freight agent for storage over night, intending next day to take them to the passenger depot and have them checked for transportation: *Van Gilder v. Chicago etc. R. R. Co.*, 44 Iowa, 548; and where a steamship company received a valise on Saturday for the convenience of the owner, who was to sail Monday, and by a rule of the company the baggage could not be checked until the presentation of a ticket, which was not done until Monday, when the valise was not to be found: *Murray v. International Steamship Co.*, 170 Mass. 166, 64 Am. St. Rep. 290, 48 N. E. 1093.

b. **Termination of Liability as Carrier.**—The strict liability of a carrier for the baggage of a passenger continues, upon its arrival at its destination, until the owner has been afforded a reasonable time and opportunity to remove it. After he has been given a reasonable time and a fair opportunity to take charge of his effects, but has failed to do so, the responsibility of the carrier becomes reduced to that of a warehouseman: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; *Kansas City etc. R. R. Co. v. Patten*, 3 Kan. App. 338, 45 Pac. 108; *Louisville etc. R. R. Co. v. Mahan*, 71 Ky. (8 Bush) 184; *Wald v. Louisville etc. R. R. Co.*, 92 Ky. 645, 18 S. W. 850; *Nealand v. Boston etc. R. R.*, 161 Mass. 67, 36 N. E. 592; *Laffrey v. Grummond*, 74 Mich. 186, 16 Am. St. Rep. 624, 41 N. W. 894; *Cohen v. St. Louis etc. Ry. Co.*, 59 Mo. App. 66; *Blackmore v. Missouri Pac. Ry. Co.*, 162 Mo. 455, 62 S. W. 993; *Van Horn v. Kermitt*, 4 E. D. Smith (N. Y.), 453; *Torpey v. Williams*, 3 Daly, 162; *Klein v. Hamburg etc. Packet Co.*, 3 Daly, 390; *Jones v. Norwich etc. Trans. Co.*, 50 Barb. 195; *Mattison v. New York Cent. R. R. Co.*, 57 N. Y. 552; *Matteson v. New York etc. R. R. Co.*, 76 N. Y. 381; *Kahn v. Railroad Co.*, 115 N. C. 638, 20 S. E. 169; *Texas etc. Ry. Co. v. Capps*, 2 Willson (Tex. App. Civ.), sec. 35; *Hoeger v. Chicago etc. Ry. Co.*, 63 Wis. 100, 53 Am. Rep. 271, 28 N. W. 435.

What constitutes a reasonable time and opportunity for a passenger to remove his baggage upon its arrival at the journey's end

depends upon the peculiar facts and circumstances of each particular case. And if the facts are in dispute, it is a question for the jury; but if they are not, it is a question of law for the court: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659; *Louisville etc. R. R. Co. v. Mahan*, 71 Ky. (8 Bush) 184; *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burgevin v. New York etc. R. R. Co.*, 69 Hun, 479, 25 N. Y. Supp. 415; *Mortland v. Philadelphia etc. R. R. Co.*, 81 Hun, 473, 30 N. Y. Supp. 1021.

It is said that the reasonable time within which the owner must apply for his baggage, when it is transported on the same train on which himself traveled, is directly after its arrival and transfer to the platform, making due allowance for the confusion occasioned by the arrival and departure of the train, and for the delay necessarily caused by the crowded condition of the depot at the time: *Chicago etc. R. R. Co. v. Addizoat*, 17 Ill. App. 632; *Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257. The customs of the railway and of the station, and the manner of transporting baggage therefrom must be considered: *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212. It would seem, too, that regard should be had to the weight, quantity, and character of the baggage, and the facilities for having it delivered at the owner's residence or stopping place if it is so cumbersome that he cannot be expected to assume personal control of it.

The lateness of the hour at which the baggage arrives is held not to excuse the owner from promptly claiming it: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659; *Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257; *Onimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646. If it arrives in the evening, and is not demanded or called for until the next morning, the responsibility of the carrier through the night is ordinarily held to be that of a warehouseman only: *Graves v. Fitchburg R. R. Co.*, 51 N. Y. Supp. 636, 29 App. Div. 591; *Jacobs v. Tutt*, 33 Fed. 412; *Wiegand v. Central R. R. Co.*, 75 Fed. 370. But this rule must be relaxed to meet particular cases. Thus where a train arrives late, the night is inclement, and the number of passengers unusual, with a corresponding accumulation of baggage, a woman passenger is not bound to demand her baggage: *Cary v. Cleveland etc. R. R. Co.*, 29 Barb. 35. And if it is customary for a carrier to close its depot so soon after the arrival and departure of an evening train that the baggage handlers do not customarily go to the depot at night, and, if the only way that baggage arriving on the train can be obtained is by special request, surrender of check, and having it left outside the depot, the owner of baggage so arriving is not guilty of negligence in leaving it in the depot over night without effort to remove it, and in case of its destruction during that time he may recover its value: *Ditman Boot etc. Co. v. Keokuk etc. R. R. Co.*, 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257.

Indeed, it seems to us that the cases must be frequent when a delay to call for baggage until the next morning after its arrival cannot be considered unreasonable. Moreover, we incline to the view that such a delay, under ordinary circumstances, is not unreasonable: See *Burgevin v. New York etc. R. R. Co.*, 69 Hun, 479, 23 N. Y. Supp. 415.

When a steamboat arrives at its destination at night, and the passengers accept the captain's invitation to remain on board until morning, the carrier is liable for the loss of their baggage occasioned by the accidental burning of the vessel during the night: *Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436. So, where a passenger gets off a boat at night, leaving his trunk on board, with the assent of the captain, on his assurance that it will be safe, and it is delivered to another person, on a forged order, the next morning, the carrier is liable: *Powell v. Myers*, 26 Wend. 591.

If a passenger does not call for his baggage until the second day after its arrival, he cannot hold the carrier to its extraordinary liability during the time the baggage remains at the depot: *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212; *Burnell v. New York Cent. R. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61. And a carrier is liable only as warehouseman where a trunk arrives in the morning, and not being called for, is placed in the baggage-room from whence it is stolen that night, the owner not calling until late the next day: *St. Louis etc. Ry. Co. v. Terrell* (Tex. Civ. App.), 72 S. W. 430.

The fact that a passenger is taken sick, and is given a lay-over ticket, so that he does not reach his destination as soon as his baggage, is held not to extend the liability of the carrier as insurer beyond what it otherwise would be: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268. But if a passenger, because of lameness, is unable to take his baggage on arriving at his destination, and arranges with the baggage-master to retain it until he can send for it, the liability as carrier continues until it is sent for: *Curtis v. Avon etc. R. R. Co.*, 49 Barb. 148. Ordinarily, however, a passenger cannot extend the carrier's liability as insurer by failing to call for his baggage on account of his peculiar circumstances: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659.

Notice to a passenger of the arrival of her baggage is not necessary to relieve a railroad company of its liability, when she is informed as to the particular time when it will arrive, but does not call for several days thereafter: *Indiana etc. R. R. Co. v. Zilly*, 20 Ind. App. 569, 51 N. E. 141.

If a passenger, after reaching the end of his journey, leaves his baggage with the carrier over night, without any arrangement in regard thereto, and for his own convenience, the liability of the carrier is simply that of an ordinary bailee: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736. If he requests the carrier to store his baggage until he calls for it, he cannot hold the carrier to its rigorous responsibility: *National Steamship Co. v. Smart*, 107

Pa. St. 492. Clearly, if he takes his baggage into his own possession, but afterward, for his own convenience, redelivers it to the baggage-master to be kept until sent for, the carrier is liable only as a warehouseman: *Minor v. Chicago etc. Ry. Co.*, 19 Wis. 40, 88 Am. Dec. 670.

In case he takes a portion of the contents of his trunk, but leaves the trunk, for convenience and with the agent's consent, at the station, the railroad company's liability as carrier ceases and its liability as warehouseman begins: *Galveston etc. Ry. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133, (Tex. Civ. App.) 24 S. W. 668. And where a theatrical company takes such baggage as it desires for the night, leaving the remainder in the car at the suggestion of the baggage-master, the responsibility of the carrier is reduced to that of a warehouseman: *Mortland v. Philadelphia etc. R. R. Co.*, 81 Hun, 473, 30 N. Y. Supp. 1021.

It is the duty of the carrier, as to baggage which has reached its destination, to have it ready for delivery at the usual place until the owner, in the exercise of due diligence, can call for and receive it: *St. Louis etc. Ry. Co. v. Terrell* (Tex. Civ. App.), 72 S. W. 430. In order to relieve itself of its extraordinary liability for the baggage, the carrier must have a baggage-master at hand to deliver baggage for a reasonable time after its arrival, and at reasonable hours thereafter: *Toledo etc. R. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; *Dinenny v. New York etc. R. R. Co.*, 49 N. Y. 546. In both of these cases the owner attempted to obtain his baggage, but was unable to do so because it had been locked up in the depot and the baggage-man was not at hand. See, also, *Georgia R. R. etc. Co. v. Phillips*, 93 Ga. 801, 20 S. E. 646.

In *Felton v. Chicago etc. Ry. Co.*, 86 Mo. App. 332, a passenger got off the train at a station without a night agent, went to the baggage car for his trunk, but did not find it. He could obtain no definite information when the trunk would be likely to arrive. It arrived the next afternoon, and that night was burglarized in the station. He called for it the following day, having gone to the country in the meantime. It was held that the carrier's liability was not reduced to that of a warehouseman.

c. **Connecting and Intermediate Carriers.**—If a passenger's journey extends over two or more connecting lines of transportation, the relation of common carrier to his baggage, under ordinary circumstances, continues throughout the route. The liability of one carrier continues until that of the next one commences; and the liability of the latter does not commence until there is a delivery to it, or at least until there is what can be considered as an equivalent to a tender of delivery. If one carrier places the baggage in its station to await the departure of the train over the succeeding carrier's line, its responsibility as carrier still continues: *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646.

**UNION PACIFIC RAILROAD COMPANY v. COLORADO
POSTAL TELEGRAPH-CABLE COMPANY.**

[30 Colo. 133, 69 Pac. 564.]

EMINENT DOMAIN—Authority of Commissioners.—Commissioners appointed in condemnation proceedings are not to determine the question of public use, nor the question of necessity for the taking, except as to the amount of land or the width of the right of way. (p. 109.)

EMINENT DOMAIN—Public Use and Necessity, Waiver of.—The questions of public use and necessity for the taking in condemnation proceedings, are for the court, and if not presented to it for determination before the appointment of commissioners, are waived. (pp. 109, 110.)

EMINENT DOMAIN—Private Use, What does not Show.—The fact that a corporation, seeking to condemn a right of way for a telegraph line, was organized for the purpose of selling or disposing of the lines which it might construct or acquire, and testimony offered that it is the creature of a foreign corporation, and has no intention to operate the line except in the interest of, and in connection with, that corporation, does not establish an intent in law to take the property for a private use. (p. 111.)

CORPORATION—Collateral Attack on Charter.—If it appears from the articles of a corporation that it is duly organized and existing under the laws of the state, its charter cannot be attacked in a collateral proceeding. (p. 111.)

EMINENT DOMAIN—Discretion in Locating Route.—The discretion which a telegraph corporation may exercise in locating its line cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided. (p. 112.)

EMINENT DOMAIN—Telegraph Line, Leave of Towns to Construct.—In proceedings to condemn land for a telegraph line over the right of way of a railroad, the fact that the line cannot be constructed through the towns along the route without their consent, is a question which does not concern the railroad company. (p. 113.)

EMINENT DOMAIN—Telegraph Line—Public Use.—A petition in condemnation proceedings for a telegraph line, which alleges that the petitioner is a corporation organized to erect and maintain lines of magnetic telegraph, is not insufficient in failing to show that the use of the line is to be public. (p. 113.)

EMINENT DOMAIN—Property Devoted to Public Use.—A Telegraph Company may condemn a right of way over that of a railroad along which there is already a telegraph line. (p. 114.)

EMINENT DOMAIN—Property Devoted to the Same Use.—Property devoted to a public use may be condemned for the same or a different public use, when the uses for which it is already held are not thereby materially interfered with. (p. 114.)

EMINENT DOMAIN.—The Title Acquired by a Telegraph company by condemnation proceedings in the right of way of a railroad is merely an easement, and damages for the taking should be assessed on that basis. (p. 115.)

APPEAL—New Questions on Rehearing.—A proposition not advanced at the original hearing of a cause will not be considered on rehearing. (p. 116.)

Teller & Dorsey, for the plaintiff in error.

Benedict & Phelps and J. R. McIntosh, for the defendant in error.

¹³⁵ GABBERT, J. Defendant in error, as petitioner, instituted an action in the court below against plaintiff in error, as respondent, to condemn a right of way longitudinally through the lands of the latter, upon which to erect and maintain a telegraph line. Such proceedings were had that commissioners were appointed without objection from either party, who heard the testimony and reported to the court. This report was adopted, and a judgment and decree rendered accordingly. To review the proceedings, respondent brings the case here on error.

Some of the errors assigned are predicated upon the matters incorporated in what is termed a bill of exceptions, which petitioner contends cannot be considered. To test this question, its counsel move to strike the bill of exceptions from the files. We shall not determine this motion, for, assuming that the matters in the bill upon which error is based by counsel for respondent are thereby properly presented, we are satisfied that the errors assigned upon what is thus disclosed are insufficient to work a reversal.

For answer respondent alleged that petitioner is a corporation organized to take property for the use of a foreign corporation, so as to enable the latter to evade the laws of this state, and that there extended along and adjacent to the lands of respondent through which petitioner was seeking to condemn a right of way, a public road, upon which petitioner is authorized, under the laws of the state, to construct its proposed ¹³⁶ telegraph line. After the appointment and qualification of the commissioners, and before proceeding to hear the testimony, counsel for respondent requested certain instructions, which were refused. At the request of counsel for petitioner, others were given. Those requested by respondent and refused were to the effect that a corporation cannot take land by the exercise of the right of eminent domain except for a public use, and then only when a necessity exists for the land so sought to be taken, and that the necessity meant by the statute is not established by proof that such land is convenient for the pur-

poses for which it is intended to be used, or will lessen the cost of constructing the structures which the petitioner proposes to erect thereon. Inter alia the court instructed the commissioners in substance that in the absence of bad faith or improper motives on the part of petitioner, it had the right to determine the route and location of its line of telegraph, and if its proper officers, in good faith, had determined to build such line, and had selected the right of way in question upon which to construct it, then the necessity mentioned in the statute is established. At the hearing before the commissioners, petitioner introduced its articles of incorporation from which it appears that the objects for which it is incorporated are the construction, acquisition by purchase or otherwise, maintenance and operation of telegraph lines in the state of Colorado, and the sale or other disposition of such lines. Respondent offered to prove that these articles of incorporation were drawn and executed at the request of the Postal Telegraph-Cable Company of New York; that no stock had ever been subscribed and paid for, except sufficient to authorize the qualification of directors; that it was not expected the latter would raise any money by subscription to stock, or otherwise; that all money would be furnished by the New York company; and that both directors ¹⁸⁷ and officers of petitioner would be under the direction and control of that company. Respondent also offered to prove the existence of a highway along, adjacent and near to respondent's right of way for the whole distance upon which a telegraph line could easily and cheaply be constructed. It also offered to prove that the petitioner had not obtained leave from the corporate authorities of certain towns through which the proposed line of telegraph must be constructed in utilizing the right of way sought to be condemned, to construct its line through such towns. These offers were refused. On the filing of the report, the respondent moved to dismiss the proceedings, because no proofs had been offered by the petitioner tending to prove the necessity for taking the right of way in question, which motion was denied.

Counsel for respondent contend that these several matters present prejudicial error, for the reason that petitioner had failed to prove that the property sought to be condemned was to be taken for a public use, or that there was any necessity for taking it. It is also urged that in view of the issues made by the pleadings, the respondent had the right to introduce at the hearing before the commissioners the testimony refused,

for the reason that such testimony tended to establish a state of facts from which it would appear the taking of the land in question was for a private and not a public use, and that there was no necessity for such taking. These matters might well be disposed of upon the ground that the law does not contemplate that commissioners in condemnation proceedings shall consider or determine such questions. On the contrary, they are to be determined by the court or judge, but unless so presented for determination before the appointment of commissioners, or the right to do so is in some way reserved, they are ¹³⁸ waived. 1 Mills' Annotated Statutes, section 1720, provides that the court or judge may appoint a board of commissioners to ascertain the necessity for taking lands sought to be condemned. What proposition may be raised upon the question of necessity will vary according to the circumstances of each particular case. In this instance, however, so far as disclosed by the pleadings, or any matter discussed in the briefs, we are of the opinion that the authority of the commissioners on that question would be limited to a determination of the one of quantity of land, or, more accurately speaking, the width of the proposed right of way sufficient to serve the reasonable physical needs of petitioner, in erecting and maintaining its telegraph line. Ordinarily, the authority of commissioners on the subject is so limited. In effect, this court has so decided in the recent case of Gibson v. Cann, 28 Colo. 499, 66 Pac. 879. It was certainly never intended that commissioners should be required to determine questions, the solution of which depends upon the application of intricate questions of law such as would be presented by the trial of issues tendered by the answer of respondent. This court has frequently decided, in cases where the question of damages in condemnation proceedings was submitted to a jury, that the only matter proper for the jury to consider was the one of damages, and that all other questions must be settled in limine: Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. 742; Thompson v. Reservoir Co., 25 Colo. 243, 53 Pac. 507; Seidler v. Seeley, 8 Colo. App. 499, 46 Pac. 848; Colorado etc. Iron Co. v. Four Mile Ry. Co., 29 Colo. 90, 66 Pac. 902.

On principle, the same rule is applicable to the case at bar. The commissioners were appointed without objection on the part of respondent; there was no attempt upon its part to submit to the court the determination of any of the questions of fact upon ¹³⁹ which it relied to defeat the proceeding, until

after the report was filed. Respondent did not seek to prove that petitioner did not require the quantity of land sought to be condemned, nor by its pleadings was any such defense suggested. None of the matters above mentioned which respondent sought to submit to the commissioners were of a character which it was the province of that body to determine; and by the course pursued the right to have them determined by the court was waived. The reason for this conclusion is obvious. If, for any reason, the petitioner in condemnation proceedings is not entitled to exercise the right of eminent domain, or take a particular tract, these questions should be determined by the court in limine. If adverse to the petitioner, that is the end of the proceeding: *Sand Creek etc. Co. v. Davis*, 17 Colo. 326, 29 Pac. 742. In this connection we will call attention to the case last cited. In that case the petitioner sought to have a right of way condemned through an already existing ditch. It was held that if the respondent desired to have the question of the feasibility and practicability of taking a right of way through such ditch determined, that the question should have been referred to a board of commissioners appointed by the court, as the law directs. This holding, however, was based upon the provisions of section 2261 and 2262 of 1 Mills' Annotated Statutes, which provide that lands improved or occupied shall not, without the written consent of the owner, be subjected to the burden of more than one irrigating ditch constructed for the purpose of conveying water through such property to lands adjoining or beyond, when the object can be feasibly and practicably attained by uniting and conveying all the water necessary through such property in one ditch; and that where it is necessary to convey water for the purposes of irrigation through the improved or occupied lands of another, ¹⁴⁰ the shortest and most direct route practicable upon which such ditch can be constructed shall be selected. These provisions, however, have no application to the case at bar. Neither were they invoked in *Gibson v. Cann*, 28 Colo. 499, 66 Pac. 879. Both parties, however, appear to have treated the question of necessity as raised by the pleadings and testimony offered as being proper to submit to the commissioners, and for that reason we shall treat it as properly presented for review.

The several assignments of error argued by counsel for respondent, including those based upon the instructions refused and given with respect to what constitutes a taking for a public use, the necessity for such taking, and the right of petitioner

to determine the route and location of its line except those specially noticed later, may be considered under this proposition: Did the evidence offered on behalf of the respondent and refused, as above noticed, tend to prove that petitioner was not seeking to condemn a right of way for a public use, or tend to establish facts which would defeat the proceeding? Counsel for respondent contends that it does, for the reasons (1) that this testimony would have established that the right of way was to be subjected to a private use; and (2) there was no necessity for taking a right of way through the lands of respondent. In support of the first proposition, it is urged that the articles of incorporation of petitioner disclose that it was organized to sell or otherwise dispose of the lines of telegraph which it might construct or acquire in this state, and that this fact, in connection with the testimony offered to the effect that it was the creature of a foreign corporation, and not its honest intention to operate the line in question except in the interest of, and in connection with, that corporation, established in law an intent to take the property of respondent for a private use. There is nothing in the spirit or policy ¹⁴¹ of the law which prohibits the same persons from organizing two or more corporations with the intention that they shall be operated in conjunction with each other. Neither does the law prohibit a corporation from accepting financial assistance from another. It should be the policy of this state to encourage the construction and operation of competing lines of communication between points within its own borders and those located within other states. In many instances, this can only be effected by corporations organized under our laws acting in conjunction with those created under the laws of a sister state. One of the essential attributes of property is the right to sell, and unless this right is limited by law, it necessarily exists. Further, it appears from the articles of incorporation of petitioner, that it is duly organized and existing under the laws of this state, and its charter cannot be attacked in a collateral proceeding: *Kansas etc. Ry. Co. v. Northwestern etc. Min. Co.*, 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684; *In re New York etc. Ry. Co.*, 35 Hun, 220; affirmed 99 N. Y. 12, 1 N. E. 27; *Frost v. Frostburg Coal Co.*, 24 How. (U. S.) 278; *Postal Tel. Cable Co. v. Oregon Short Line Ry. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Postal Tel. Cable Co. v. Oregon Short Line Ry. Co.*, 104 Fed. 623; *Oregon Short Line Ry. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842.

In the last three cases cited, the identical question presented by the answer of respondent and the testimony offered relative to the good faith and power of petitioner, was raised, in the same manner as in the case at bar, and in each instance it was held that the matters thus presented were wholly immaterial.

It is urged that if respondent had been permitted to prove the existence of a highway adjacent to the route upon which petitioner proposes to erect its telegraph line, and also, prove that leave to erect such line through certain incorporated towns through which the proposed right of way extends had not¹⁴² been secured from the municipal authorities of such towns, that then non-necessity for taking the lands of respondent would have been established. In support of this proposition we are referred to section 587 of 1 Mills' Annotated Statutes, which provides that telegraph companies organized under the laws of this state may construct their line along and upon the public roads; and section 588 of 1 Mills' Annotated Statutes, which inhibits such companies from constructing their lines upon the streets or alleys of an incorporated town without the consent of the corporate authorities. The legislature has vested corporations of the character of petitioner with discretion in locating their telegraph lines. Ordinarily, the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided: *In re New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *California Cent. Ry. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Chicago etc. R. R. Co. v. Dunbar*, 100 Ill. 110.

There was no showing of this character on the part of the respondent. True, it did introduce evidence to the effect that the erection of a telegraph line along its right of way would cause some inconvenience, and might possibly increase the hazard of railroading, but in no greater degree in this particular instance than other railroads must suffer from the erection of telegraph lines adjacent to their railroad tracks—a condition which exists almost without exception along every line of railroad in the United States.

On behalf of respondent it is contended that in the absence of leave from the municipal authorities ¹⁴³ of the towns situate along the proposed right of way to erect and maintain its line through such towns, and through which the lands sought to be condemned extend, petitioner could not take such lands because the proceedings must be regarded as an entirety. This question does not concern respondent. If petitioner cannot erect its line of telegraph through the towns in question, except it obtain leave to do so from the corporate authorities, and fails to obtain such leave, respondent is not injured. Petitioner cannot use the right of way situate within the corporate limits of towns except for the purposes for which it is taken. If it never utilizes the right of way within such limits, respondent cannot complain. Petitioner might be able to build its line around such towns, but that certainly can make no difference to respondent: *California Southern R. R. Co. v. Kimball*, 61 Cal. 90; *Chicago etc. R. R. Co. v. Dunbar*, 100 Ill. 110.

The motion to dismiss heretofore noticed was also based upon the ground that the petition was insufficient. In support of this claim it is urged: 1. It does not appear from the statements of the petition that the telegraph line of petitioner is to be public; and 2. Property held by one corporation for a public use cannot be taken by another for the same purpose and use. The object for which land is taken determines whether or not the use to which it is to be subjected, when condemned, is public: *Denver etc. Co. v. Union Pac. Co.*, 34 Fed. 386.

In the petition it is alleged that petitioner is a corporation organized for the purpose of erecting and maintaining lines of magnetic telegraph in this state. The laws of the state provides that companies may be organized for the purpose of maintaining telegraph lines: 1 *Mills' Annotated Statutes*, sec. 587. The business which such companies are authorized to transact is public in its nature. They must receive and transmit ¹⁴⁴ messages from other companies engaged in the same business, and transmit messages tendered by any person: 1 *Mills' Annotated Statutes*, secs. 589, 590.

Counsel for respondent recognize that property held for a public use is subject to the eminent domain power of the state, but contend that such property cannot be taken by another to be used for the same purpose, for which it is already held. The case made does not fall within the exception claimed. Proceedings in condemnation may be maintained by a

telegraph company against a railroad corporation: Laws 1885, p. 358. It appears there is already a line of telegraph along the respondent's right of way. The evidence discloses, however, that the proposed line of petitioner will neither interfere with this line, nor with the operation of respondent's railroad. There is ample room for all. No property of respondent will be taken which is already devoted to, or needed for, a public use, and it is, therefore, not in a position to insist that property held by it for a public use will be taken by another for the same or a different use. The mere fact, therefore, that petitioner seeks to condemn a right of way through lands belonging to a railroad company does not render the petition insufficient. The respondent cannot successfully resist the condemnation of such right of way unless it appears that its use was necessary to the maintenance and operation of its railroad and the lines of telegraph already erected thereon, or is needed for such purpose. That property held for a public use may be taken under the exercise of the right of eminent domain for the same or a different public use, when such taking does not materially interfere with the uses for which it is already held, has been recognized in a great number of cases in which this subject has been considered: *Mobile etc. Ry. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 43 Pac. 602; *Southwestern Tel. & Tel. Co. v. Gulf etc. Ry. Co.* (Tex. Civ. App.), 52 S. W. 106; *Postal Tel. Cable Co. v. Oregon Short Line Ry. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Salt Lake City v. Salt Lake City etc. Electric Power Co.*, 24 Utah, 249, 67 Pac. 672; *Colorado etc. Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293.

The final question to be considered relates to an instruction on the question of damages. This instruction is to the effect that the declarations in the petition covering the manner of the construction of the telegraph line were binding upon the petitioner, and if right of way was granted, the construction of the line must be in accordance with such declaration. It is said this instruction is erroneous, because, according to the statements in the petition, it was only sought to condemn an easement. Counsel for respondent contend that, under the eminent domain act, nothing less than a fee can be taken, and that the damages should have been assessed upon the basis that the title taken by petitioner was of that character. Neither of these reasons is tenable. The statute which authorizes telegraph

companies to condemn part of the right of way belonging to a railroad company—Laws 1885, *supra*—must be construed in connection with the chapter on the subject of eminent domain. While it is true the latter seems to recognize that the title taken in condemnation proceedings is a fee, the act above referred to was passed subsequent to the section containing this provision, and therefore, must control the title which telegraph companies may take by eminent domain proceedings in the right of way of a railroad company. The language of the act clearly imports that an easement is the character of title which a telegraph company may condemn in such way for it expressly provides that the line shall be so constructed and maintained as not to obstruct or hinder the usual operation of the railroad along the right of way on which the line is ¹⁴⁶ constructed. The spaces over which the wires are strung from pole to pole are not taken by petitioner. The language of the petition relative to the use to which the right of way is to be subjected, and the manner in which the telegraph line is to be constructed and maintained, as well as the act of 1885, *supra*, recognize that an easement only is claimed and can be taken; and that the respondent still has the right to use its right of way for railroad purposes except so far as the poles erected may interfere with that use, subject, however, to the right of petitioner to enter for the purpose of erecting and repairing its line. Under statutes similar to our own—Laws 1885, *supra*—it has been decided in other states that the title acquired by a telegraph company by condemnation proceedings in the right of way of a railroad company is merely an easement: *St. Louis etc. R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile etc. Ry. Co. v. Postal Tel. Co.*, 76 Miss. 731, 26 South. 370.

The judgment of the district court is affirmed.

ON PETITION FOR REHEARING.

Per CURIAM. Complaint is made that no decision was rendered on the alleged errors of the commissioners in receiving testimony on behalf of petitioner as to the value of the lands taken for agricultural purposes, and rejecting that offered on behalf of respondent as to their value for railroad purposes. In the brief of counsel for respondent, reference is made to these matters, but no argument whatever was offered for the purpose of showing wherein the reception and rejection of such testimony was erroneous, and for that reason they were not referred to in the opinion. The only argument on the subject of damages

was limited to a discussion of the instruction which it was said advised the ¹⁴⁷ commissioners that the title to the right of way sought to be condemned was only an easement.

In the answer filed by respondent, it was stated that the land sought to be taken was a part and parcel of a right of way granted by the government to the predecessors of respondent, on condition that a continuous railroad and telegraph line should be constructed and maintained along and on such land. Wherein the source of title, or the purpose for which the right of way was granted by the general government, were material, was not argued by counsel, and therefore no opinion was expressed on the question or questions thus sought to be raised by the answer. We are now asked to grant a rehearing so that such questions may be discussed and determined. This must be refused, because a proposition not advanced at the original hearing of a cause will not be considered on rehearing: *Morgan v. King*, 27 Colo. 539, 63 Pac. 416. If new questions could be urged after decision rendered, there would be no end to a case brought here on appeal or error.

Petition for rehearing denied.

Under the Power of Eminent Domain property already devoted to a public use may be condemned: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Kansas City etc. Ry. Co. v. Northwestern etc. Co.*, 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684; *Chicago etc. Ry. Co. v. Starkweather*, 97 Iowa, 159, 59 Am. St. Rep. 404, 66 N. W. 87; *Little Nestucca Road Co. v. Tillamook Co.*, 31 Or. 1, 65 Am. St. Rep. 802, 48 Pac. 465; monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 157-147. Thus, one railway corporation may acquire a right to use a part of the right of way of another: *Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co.*, 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107; and a telegraph company may acquire a right to construct its line along the right of way of a railroad: *Postal Tel. Cable Co. v. Oregon Short Line R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

The Right to Condemn a Right of Way to be transferred to another is denied in *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 67 Pac. 1040, 70 Pac. 1083. But the fact that a foreign corporation is interested in a company organized to construct a telegraph line in the state does not affect the latter's right to condemn a right of way: *Postal Tel. Cable Co. v. Oregon Short Line R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

CLAYTON v. HALLETT.

[30 Colo. 231, 70 Pac. 429.]

WILLS—Subsequently Acquired Real Estate.—Under the common law a will passes only such real estate as the testator owned at the time of its execution, but under the Colorado statutes it passes after-acquired realty if such appears to be the testator's intention. (p. 123.)

COMMON LAW—How Far in Force in Colorado.—The principles of the common law, as it existed in the fourth year of James I, are in force in Colorado. (pp. 123, 126.)

CHARITABLE USES—Whether Governed by Common Law.—Charitable uses are enforced in Colorado in accordance with the principles of the common law. (p. 126.)

TRUST, Capacity of City to Hold Property in.—Municipal corporations may take and hold property in their own right by direct gift, conveyance or devise, in trust, for purposes germane to the objects of the corporation, or which will aid in carrying out those objects. (p. 127.)

CHARITABLE USE—City May Accept and Execute.—Under a statute enabling a city to take gifts by devise, and a charter providing for the assistance of charitable organizations and for the good order, health, good government, and general welfare of the city, it may take property in trust for the education of orphans. (pp. 131, 137.)

CHARITABLE USE—What Law Governs City's Capacity to Accept.—The capacity of a city to accept a devise for a public charity is determinable by the state of the law at the time when the will, by its terms, is to take effect, and not at the time of the testator's death. (p. 132.)

CHARITABLE USE—Indefiniteness of Beneficiaries.—A devise of property in trust to establish a college for educating "as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain," the executors being authorized "to promulgate such rules and regulations as they shall deem proper for the government of the institution," is not void for indefiniteness. (p. 134.)

CHARITABLE USE—Designation of Beneficiaries.—The appointment of trustees with authority to control the institution, in a will devising property to establish a college for educating "as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain," carries with it, by implication, authority to designate the beneficiaries. (p. 136.)

CHARITABLE USE.—The Education and Preferment of Orphans, being one of the subjects mentioned in the statute of 43 Elizabeth, chapter 4, is considered a public charity in Colorado. (p. 137.)

George W. Clayton died in 1899, and his will was admitted to probate in October, of the same year. Moses Hallett was appointed sole executor, William M. Clayton not surviving his brother. The fourteenth and fifteenth clauses of the will read as follows:

"Fourteenth. All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situated, intending and meaning to include therein all reversionary devises and bequests, real and personal estate, the use of which I have hereinbefore given for life, to the several persons above herein mentioned, respectively, after the same shall have been discharged of the respective trusts, by death of the persons, respectively entitled to the use thereof for life, and all legacies above given which shall lapse, by reason of the death of the legatee prior to my decease, or from any other cause, I do hereby give, devise and bequeath, unto the corporation of the city of Denver, in trust nevertheless, to be devoted solely and exclusively to the founding, establishing, and forever maintaining a permanent college within the city of Denver, in the county of Arapahoe and state of Colorado, for the better education, and more comfortable maintenance, than they usually receive from the application of public funds, of poor, white male orphan children, somewhat on the plan of the Girard College, in the city of Philadelphia, in the state of Pennsylvania, but necessarily in a very much smaller way. The college building shall be of stone, substantially built upon a plat of ground of sufficient size to admit of the construction of additional college buildings, if the same shall become necessary or expedient. The institution above mentioned shall be established within ten years from and after my decease as may be practicable in the judgment of my executors. They shall carefully devise and promulgate such rules and regulations as they shall deem proper for the government of the institution, and which shall be carried out, and be obligatory, with the same force and effect as if herein set forth at large. And for his services in this behalf my executor, Moses Hallett, shall receive the sum of five thousand dollars per year, until the said college shall be organized. I make this provision for my said executor, Moses Hallett, for the reason that I believe the burden of this trust will fall principally upon him, and I have made provision herein for my brother William M. Clayton, the other executor, in case he shall survive me. The above provision for compensation to my said executor, Moses Hallett, is personal to him, and shall not apply to any other executor or trustee, who may become his successor. It is my desire that in carrying out my purposes, as set forth, in this section of my will, before a college site shall be selected, or plan of a college building shall be adopted, a careful estimate of the total of my estate subject to this purpose shall be made and so

much thereof only shall be devoted to the purchase of a site, and the building, and the furnishing of the college as will leave my estate a sufficient fund to provide revenue for the proper maintenance of the same and of the orphans admitted thereto, and supplying competent instructors, teachers and nurses therein, who shall be of tried skill, and of good moral character. So much of the residuary of my estate as shall remain after the purchase of a site, the erection of the college and the furnishing of the same with proper furniture and appliances, shall be set apart and held and kept inviolate forever (save and except as hereinafter provided) and the income, rents, and revenues thereof, shall be used solely and exclusively for the maintenance of said institution and of the orphans admitted therein. The institution shall be organized as soon as practicable within ten years from and after the time of my death, and due public notice of the intended opening of the college shall be given, so that there may be an opportunity to make selections of competent instructors, teachers and nurses, and that those who may have the charge of the orphans, may be aware of the provisions intended for them. It is my desire that the college shall be under the management and supervision of a board of five trustees, which shall be composed of the judge of the district court of the United States for the district of Colorado, or such person as he shall appoint. The senior judge of the district court of the state of Colorado of that judicial district which shall include the county of Arapahoe, or such person as he may appoint, and the chief justice of the supreme court of the state of Colorado or such person as he may appoint, and my two executors hereinafter named, during life; and that after their decease, two other reputable freeholders of the county of Arapahoe, to be appointed by the mayor of the city of Denver, with the advice and consent of the city council of said city, which said trustees so appointed by the said mayor, shall hold their office for one year and until their successors shall be appointed and confirmed in like manner. None of the trustees shall receive any compensation whatever, from my estate, for his services as such trustee. Inasmuch as I have this matter seriously at heart, and my desire is that the greatest possible good may be derived from my bequest for said college, I do hereby enjoin and require, that if at the close of any year the income of the fund devoted to the purposes of said college be more than sufficient for the maintenance of the institution for that year, then the balance of the said income, after defraying said main-

tenance shall be invested in good securities thereafter to be and remain a part of the capital; but in no event shall any part of said capital fund be sold, disposed of, or pledged, to meet the current expenses of the institution. And I do hereby expressly declare that all the bequests and devises in this section of my will, made of the said residue of my estate, to the said corporation of the city of Denver, are made upon the following express conditions, that is to say:

“First. That the name of said institution shall be, the George W. Clayton College.

“Second. That none of the moneys, principal, interest dividends, income, or rents arising, or accruing from the said residuary devise and bequest shall at any time, be applied to any other purpose or purposes whatever, than those herein mentioned and appointed.

“Third. That separate, true and accurate accounts, distinct from all other accounts, of the said corporation of the city of Denver, shall be kept, concerning the said devise, bequest, college, and funds, and of the investment and application thereof, and that separate account or accounts, of the same shall be kept in bank, not blended or mingled with any other account, so that it may be at all times appear, on examination by a committee to be appointed by the judge of the county court of Arapahoe county that my instructions have been fully and strictly complied with.

“Fourth. That the said corporation shall render a detailed account, verified by oath, annually, to the county court of Arapahoe county, sitting in probate, at the January term thereof, concerning the said devised and bequeathed estate, and the investment and application of the same, and shall submit all their books, papers, and accounts, touching the same to a committee of said county court, for examination, whenever the same shall be required.

“Fifth. The said corporation shall also cause to be published in the month of January annually, in one or more newspapers published in the city of Denver, a true and concise statement and account, of the trusts, devises, and bequests, herein declared and made, showing the condition of said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January.

“As many poor, white male orphans—and by the term ‘orphan’ is meant, any child whose father is dead, between the ages of six and ten years, born of reputable parents, as the in-

come shall be adequate to maintain, shall be admitted into the college, as soon as possible, after the opening thereof; and from time to time thereafter, as there may be vacancies, or as increased ability from income may warrant, others shall be admitted; but in giving admission, preferences shall be given—1st, to orphans born in and belonging to, the county of Arapahoe, and 2d, to orphans born in and belonging to other counties in the state of Colorado.

“If it should unfortunately happen that any of the orphans admitted into the college shall, from misconduct have become unfit companions for the rest, and mild means of reformation shall prove abortive, they shall no longer remain therein.

“Those orphans who shall merit it shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age, as in the judgment of the trustees shall be deemed best; and while there shall be fed with plain and wholesome food, and clothed with decent apparel; and due regard shall be paid to their health. They shall be instructed in such various branches of sound education, as will tend to make them useful citizens, and honorable members of society.

“If the income arising from that part of the said residuary devise and bequest remaining after the construction and furnishing the said college, shall be adequate to justify it, or if the said institution receive donations from other generous men or women, and there shall be need of another college building, or buildings, owing to the increase of the number of orphans, then and in that case, the trustees of said college may devote so much of the said accumulated income as may be necessary for that purpose, to the building of an additional college building or buildings, having in view at all times a sufficient reserve capital fund to provide revenue adequate for the maintenance of said college and of the orphans admitted thereto.

“Fifteenth. I give, devise and bequeath all my real and personal estate, of whatsoever nature, or kind soever, and where-soever situated, unto my brother William M. Clayton and Moses Hallett, my trusted friend, the executors of this my last will and testament, hereinafter appointed, in trust, for the payment of my just debts, and the legacies, devises and bequests, above herein specified, and I do hereby expressly authorize and empower them, my said executors, to sell, convey, and dispose of the same, at public or private sale, at such time, or times, and upon such terms, and in such manner as to them shall seem meet; or to improve the same for the purpose of accumulating

revenue for the fund, above mentioned; provided, they shall have ten years from my decease to dispose of, sell or to improve to the best advantage, the balance of my real estate, remaining, after the aforesaid bequests are paid, and for the purposes above mentioned."

In February, 1900, Thomas S. Clayton filed a complaint to have the will declared void as to the residuary estate. From a judgment for the defendants the plaintiff appeals. The plaintiff contends that the real estate acquired by the testator after the execution of the will did not pass by the devise; that the will provides no method of selecting and ascertaining the beneficiaries, and hence the trust is void for indefiniteness; that the statute of 43 Elizabeth, chapter 4, is not in force in Colorado; that courts of equity in Colorado, over charitable uses, possess only so much of the jurisdiction of the English court of chancery as was derived from its ordinary, inherent, judicial jurisdiction over trusts; that no competent trustee is named in the will; that the beneficiaries are uncertain and indefinite and without any vested right in the property; and that the trust was intended to be personal to the city, and even if the English doctrine is adopted, another trustee cannot be substituted.

Carlton, Skelton & Morrow, Luther M. Goddard and J. B. Bissill, for the appellant.

W. C. Kingsley and Mary F. Lathrop, for the appellees.

241 STEELE, J. We shall not dwell upon the objection made that the county court was the proper tribunal in which to bring this action, and that the plaintiff, by not contesting in the county court, waived his right to question the validity of the will or any of its devises in any other proceeding, because we are not required to pass upon these questions in order to determine this controversy. We should, perhaps, suggest that the statute makes the probate of a will in this state a solemn proceeding, and that it appears to invest the county court with jurisdiction to determine all questions **242** of law and fact relating to the proof of wills and matters testamentary.

We shall first dispose of the question presented by the plaintiff that the property of the testator acquired after the execution of the will did not pass, upon his death, to the executors and trustees under the fourteenth and fifteenth clauses of the will. Only such real estate as the testator owned at the time of the execution of his will could pass by the will under the common

law. But by section 4652, Mills' Annotated Statutes, a testator is given power to devise the real estate "which he hath, or at the time of his death shall have." This section of our statute was copied from Illinois, and the courts of that state, long prior to its adoption here, construed it as abrogating the rule of the common law; and, under the familiar rule of construction, which we shall presently state, the decisions of Illinois should control.

It is held in Illinois that if no intention appears from the will to devise after-acquired property, it will not pass, but that such intention is sufficiently shown by the language, "I bequeath all my property, real and personal, wherever the same may be"; and that "it will be presumed, where the contrary does not appear, that a party deliberately making his will does not intend to leave anything undisposed of": *Willis v. Watson*, 4 Scam. 64; *Missionary Society v. Mead*, 131 Ill. 33, 23 N. E. 603.

In the will under consideration this language is employed: "I give, devise and bequeath all my real and personal estate of whatsoever nature or kind soever and wheresoever situated," etc., and "all the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situated," etc. This, in our judgment, shows plainly the intention of the testator to dispose of all his estate; and we must hold that the entire estate of which George W. ²⁴³ Clayton died seised passed by his will, unless the trust created by the fourteenth section of the will be declared invalid.

We are of the opinion that the statute of 43 Elizabeth, chapter 4, so far as applicable, is in force in the state of Colorado. Our statute which provides that the common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament made in aid of or to supply the defects of the common law, prior to the fourth year of James I, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority, was enacted in 1861 and repealed and re-enacted in 1868. Prior to the re-enactment, the Illinois authorities had held that the statute of Elizabeth referred to was in force in the state of Illinois. Our statute was under consideration by this court in the case of *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, and it is there said: "It must be presumed that our legislature was familiar with these decisions, and under a familiar rule of construction, unless there are peculiar reasons for a contrary

holding, when a state adopts the statute of another state, the construction which the courts of the latter state put upon the statute before such adoption should be followed by the courts of the adopting state."

It is well settled that long prior to the enactment of the statute of Elizabeth, the courts of chancery of England had exercised jurisdiction over charitable trusts, and had enforced them under its judicial power whenever the intention of the testator was clearly expressed.

Mr. Justice Story, in the case of *Vidal v. Girard*, 2 How. 127, in reference to the case of *Trustees etc. v. Hart*, 4 Wheat. 1, says: "The court, upon that occasion, went into an elaborate examination ²⁴⁴ of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, chapter 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure and flickering), the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects occurred." Namely, where the trustees mentioned in the trust were an unincorporated association which had no legal capacity to take or hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.

"But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records of England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth; and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the court of chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees

were not competent to take. . . . If, then, this be the true state of the ²⁴⁵ common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may, from time to time, be applied by the legislature to supply the defects. It is no proof of the nonexistence of equitable rights, that there exists no adequate legal remedy to enforce them."

And, citing from *Witman v. Lex*, 17 Serg. & R. 88, 17 Am. Dec. 644: "It is immaterial whether the person to take be in esse or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid. In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid, and were enforced accordingly. The case then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it."

It is stated by Woerner in his work on Administration that "The statute of 43 Elizabeth, chapter 4, has been abolished, or never was in force, in Maryland, Michigan, Minnesota, New York, Virginia, West Virginia, and, it seems, Wisconsin; and charitable uses are in ²⁴⁶ those states governed by the same rules as are applied to other devises and gifts except in so far as the statute of the state may have introduced a change. The statute is held not to be in force, also, in Alabama, California, Connecticut, Delaware, District of Columbia, Indiana, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee; but in these states the distinction between charitable uses and ordinary trusts formerly ascribed, in many of the states, to the operation of this statute, is held to emanate from principles of public policy, recognized at common law,

and announced by the courts before the enactment of the statute, which, in this respect, is but declaratory of the pre-existing common law. Hence, the same rules are applied, in these states, as if the statute were in force. The statute is held to be in force in Kentucky, Illinois, Maine, and Massachusetts, to which may be added a number of states in which not the statute itself, but its principles, as declaratory of common law in relation to charitable uses, are held to be the law of the state. Among these may be reckoned Arkansas, California, Georgia, Iowa, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Vermont: Woerner on Administration, sec. 431.

So that whether the statute of Elizabeth is held to be in force in this state or not, the principles of the common law, as it existed prior to the fourth year of James I, are in force in this state; and charitable uses are to be enforced here in accordance with the principles of the common law.

The decisions in the United States concerning charitable trusts cannot be reconciled. They can be classified according to states. This has been done by Mr. Woerner, and the authorities cited by him support his text. It seems that at the common law a bequest or devise to charity is peculiarly favored.²⁴⁷ It is not affected by the law applicable to perpetuities or the accumulation of income. It is to be given the most liberal construction, to the end that the wishes of the donor be enforced. A devise to charity is, therefore, not rendered invalid because trustees are not named, nor because a trustee incapable of taking is named. The court, in the exercise of its judicial functions, will never permit a trust to fail for the want of a trustee. Though the beneficiaries are described in an indefinite and uncertain manner, the courts will enforce the bequest and uphold the trust, if by any means the beneficiaries are ascertainable. If the question of the designation of the beneficiaries is left to trustees, it is no objection to the validity of the trust; and it is only in cases where the beneficiaries named are so vague and uncertain that courts are incapable of executing the trust, that the trust is declared to be invalid. In England, courts assume the authority of substituting a scheme of their own in cases where the scheme proposed by the testator is vague and uncertain, but in this country, the courts possess no such power, and never substitute another charity for the charity named by the testator; and it is only in cases where the wishes of the testator cannot be carried out that the trusts fail.

The following cases and the citations therein are decisive of one or more of the various questions involved in this controversy, and in them we find the following propositions fully sustained: That the statute of 43 Elizabeth, chapter 4, so far as it recognizes or indicates what are charitable uses, and in so far as it gives validity to gifts for such uses, is in force in this country as a part of the common law, unless it has been expressly repealed. That the details of the statute, and the remedies provided therein, are not applicable to our conditions or institutions and are not in force here. That, independently ²⁴⁸ of that statute, the courts of this country have original, inherent jurisdiction over charitable gifts and trusts. That such jurisdiction was exercised by the courts of England prior to the enactment of the statute of Elizabeth. That in the exercise of this jurisdiction, the courts will enforce such gifts in accordance with the desires of the donor. That a gift for charitable purposes will not fail for want of a trustee. That such gifts are excepted from the rule against perpetuities and accumulation. That it is not necessary that the beneficiary or the trustee should be clothed with power or capacity to accept the gift at the time of the grant, but the intention of the donor will be executed if a capacity arises within a reasonable time thereafter. That a charitable gift will not fail because it favors a class of the population. That it is immaterial how indefinite or vague the subjects are, provided there be a discretionary power vested anywhere over the application of the donor's bounty. That where there exists the least circumstance from which to collect the testator's intention of anything else than an immediate devise to take effect in *praesenti*, then, if confined within legal limits, it is good as an executory devise. That municipal corporations may hold property in trust for charitable uses within the scope of their powers or duties. That if such trust is repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compelled to execute it, but it will furnish no ground to declare the trust itself void. That a devise to a corporation for charitable uses operates as an appointment rather than a bequest: 2 Blackstone's Commentaries, 376; *In re John's Will*, 30 Or. 494, 47 Pac. 341, 50 Pac. 226; *Pell v. Mercer*, 14 R. I. 412; *Zimmerman v. Anders*, 6 Watts & S. 218, 40 Am. Dec. 552; *Taylor v. Trustees*, 34 N. J. Eq. 101; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *Howe v. Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390; *Ould v.*

Washington Hospital, 95 U. S. 303; Miller v. Chittenden, 2 Iowa, 315; Miller v. Chittenden, 4 Iowa, 252; Attorney General v. Jolly, 1 Rich. (S. C.) 99, 42 Am. Dec. 349; Wade v. American Col. Soc., 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324; Fink v. Fink, 12 La. Ann. 301; Doughten v. Vandever, 5 Del. Ch. 51; Williams v. Pearson, 38 Ala. 299; Executors of Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Bell County v. Alexander, 22 Tex. 351, 73 Am. Dec. 268; Beall v. Executors of Fox, 4 Ga. 404; Estate of Hinckley, 58 Cal. 457; Grisson v. Hill, 17 Ark. 483; Trustees v. Zanesville etc. Co., 9 Ohio 203, 34 Am. Dec. 436; Missouri Hist. Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Moore v. Moore, 4 Dana, 354, 29 Am. Dec. 417; Chambers v. City of St. Louis, 29 Mo. 543; Tappan v. Deblois, 45 Me. 122; Heuser v. Harris, 42 Ill. 425; Sears v. Chapman, 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604; Craig v. Secrist, 54 Ind. 419.

It may be stated as a general proposition of law, that a corporation capable of holding real estate is capable also of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance or devise, in trust, for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So, in this case, unless the objects of the incorporation of the city of Denver are foreign to the purposes expressed in this trust, the city of Denver is capable of taking the property and executing the trust in accordance with the provisions of the will.

It is said that by the constitution and laws of Colorado the municipalities of the state are inferentially prohibited from maintaining schools; that that function of government is left to the school districts of the state; and that this provision of the will of George W. Clayton should not be enforced because of ²⁵⁰ the policy of the state so expressed. As far as the policy of the state is concerned, the act of 1901 enabling the city of Denver to take gifts by devise declares it to be in favor of the city's accepting such devise.

Gilbert Hatheway died in 1871, and by will gave to the corporation of the village of New Baltimore fifteen thousand dollars to be used in the erection of a school building to be used as a high school, and to be suitable for that purpose, and to be known as the Hatheway School. The legislature of Michigan, in the year 1873, passed an act enabling the village to accept

the gift. In the case of *Hatheway v. Sackett*, 32 Mich. 99, a case in which this legacy was under consideration, the court said: "They [the plaintiffs in error] insist that our general state policy is opposed to all connection between village government and school administration, and then seek to infer that this general policy is applicable to this specific case. But the act of 1873 negatives this inference; because, whatever its force as an enabling act, it is, at least, a direct and explicit expression of the sense of the legislature that in truth it is not impolitic for the village of New Baltimore to accept this very bequest. We have, then, distinct and solemn evidence that the legislature have considered it entirely consistent for the corporation to have the identical legacy in question."

It is said by Judge Dillon, in his work on *Municipal Corporations*, that "Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues ²⁵¹ are absolutely necessary, and, therefore, legacies of personal property, devises of real property, and grants of gifts of either species of property directly to the corporation or for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burden of its citizens, are, in the absence of disabling or restraining statutes, valid in law. Thus, a conveyance of land to a town or other public corporation, for benevolent public purposes, as a site for a schoolhouse, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated": *Dillon on Municipal Corporations*, sec. 566.

And in *Perry on Trusts*, section 43, it is said: Municipal corporations cannot "act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them. Thus towns, cities and parishes may take and hold property in trust for the establishment of colleges, for the

purpose of educating the poor, for the relief of the poor, though not paupers, by furnishing them fuel at a low price, and for the support of schools, or for any educational or charitable purposes within the scope of its charter." And cases are cited in support of the text.

Charles McMichen, a citizen and resident of Cincinnati, made his will in 1855, and died in 1858 without issue. He devised certain real and personal property to the city of Cincinnati and its successors, in trust, forever, for the purpose of building, establishing ²⁵² and maintaining, as far as practicable, two colleges for the education of boys and girls. The supreme court of the United States, in *Perin v. Carey*, 24 How. 465, held that this was a valid devise, and that "the city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMichen." Upon this subject of the authority of municipal corporations to administer a trust, Mr. Justice Wayne, speaking for the court, said: "The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such a trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, ²⁵³ even though the act of incorporation may have for its main objects mere civil and municipal government and powers."

Stephen Girard died in the year 1831, and by his will devised and bequeathed to the city of Philadelphia the residue of his estate in trust for the establishment and support of a permanent college for the education of poor white male orphans. This devise was sustained by the supreme court of the United States, and the court held that: "The corporetion of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust: *Vidal v. Girard*, 2 How. 127.

Bryan Mullanphy died in the year 1851, and by his will devised and bequeathed the undivided one-third of his property to the city of St. Louis, in trust, "to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way to settle in the west," and this trust was sustained by the supreme court of Missouri, in the case of *Chambers v. City of St. Louis*, 29 Mo. 543.

It is said that the legislature has not granted to the city of Denver authority to acquire and hold real and personal property, except as it is necessary for the public uses of the inhabitants thereof, and that for that reason the bequest and devise to the city of Denver is an invalid one and should be declared void, and the court should hold that as to his residuary estate George W. Clayton died intestate. The decisions are, as we have cited, to the effect that where municipal corporations are organized for purely governmental purposes, they may accept gifts for charity if the charity is germane to the general purposes of the organization. The general ²⁵⁴ purpose of all municipal corporations is to promote the general welfare and happiness of the people residing therein. Such was the purpose of the legislature in granting to the city of Denver its charter. To say that because this devise is for the benefit of a class of the inhabitants of the city of Denver or elsewhere, it is a private and not a public charity is contrary to the decisions upon the subject.

The sections of the charters of Philadelphia, Cincinnati and St. Louis quoted in the cases cited show that the charters of these cities and the charter of Denver are practically alike. In each is contained the general provisions found in nearly all charters, that tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness. If the city of Philadelphia can hold property in trust for the education of

poor white male orphans, and the city of Cincinnati can lawfully execute a trust for the education of boys and girls, and the city of St. Louis can, without violating its organic law, administer a trust "for the purpose of furnishing aid to poor emigrants" passing through the city, there is no apparent reason why Denver, under her charter, which provides for the entertainment of visitors (trade), for the encouragement of manufactures (industry), for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city, cannot accept and execute a trust for the education of poor white male orphans.

Furthermore, the legislature, by the act of 1901, clothed the city of Denver with full power and authority to accept the trust created under the will, and to administer it according to the terms and provisions of the devise. It is said that this devise must be construed with reference to the capacity of ²³⁵ the city at the time of the death of George W. Clayton; that the estate, at the time of George W. Clayton's death, vested either in the heirs or in the trustee named. We cannot agree with counsel in this contention. The devise to the trustee is in the nature of an executory devise. It is to take effect when the executor, Moses Hallett, or an administrator with the will annexed, marshals the assets of the estate, selects a site, and erects a building, in accordance with the provisions of the will. Then, and not till then, in our judgment, is the city of Denver called upon to accept or reject the trust imposed.

An act of the New York legislature was passed after the death of a testator, authorizing a town to accept a gift for charitable purposes made by a resident of Massachusetts. The validity of the gift was contested in the Massachusetts court. In *Fellows v. Miner*, 119 Mass. 541, the court says: "This bequest is 'to the town of Kinderhook, New York, in its corporate capacity,' in trust for the charitable uses and purposes declared in the will. The statute of New York of 1875, chapter 200, section 1, expressly authorizes that town in its corporate capacity to receive and hold in trust all property bequeathed to it by this will, for the uses and purposes therein mentioned. The bequest being valid by the law of this state, the town named in the will as trustee being now enabled, by a special act of the legislature of the state in which it is situated, to take the bequest, and the trust being directed by the will to be executed in that state and for the benefit of the inhabitants of that town, the court might properly direct that the fund be paid over to

the town, if it were clear that the trust could thereupon be lawfully administered according to the will of the testator."

In the case of *De Camp v. Dobbins*, 29 N. J. Eq. 36, the court says: "If a corporation takes land ²⁵⁶ by grant or devise, in trust or otherwise, which, by its charter, it cannot hold, its title is good as against third persons and strangers; the state alone can interfere. And again, if the limitation did, in fact, exist, the legislature might remove the restriction to permit the corporation to execute the trust or authorize it to receive the gift and administer the trust, notwithstanding the limitation. This court will not suffer a trust to fail for want of a trustee; will uphold a trust for a reasonable time, when necessary, in order to enable the trustee to obtain the requisite authority to take and execute it. But, again, the restriction insisted upon does not, in fact, exist. It was removed by the act of 1872."

Mr. Justice Thompson, in the case of *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99, said, in reference to the will of Robert Richard Randall and the act of the legislature passed after his death: "If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarded against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books, as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. But no such difficulty, in my judgment, is here presented. If the intention of the testator cannot be carried into effect, precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which, with the aid of the act of the legislature, must remove all difficulty." And Mr. Justice Johnson, in a concurring opinion, said: "But as a charity, to be governed by the law of the state of New York, it appears to me almost idle to ²⁵⁷ view this case with reference to any other rule of decision than their own adjudications. The case of *Coggeshall v. Pelton*, 7 Johns. Ch. 292, 11 Am. Dec. 471, was a case of greater difficulties than the present; for there the devise is immediate in praesenti, to a devisee having no capacity to take at the time. The legislature afterward gave that capacity, and the court held the devise valid; nor is it unimportant in that case to observe that the case in Amb. 422, of the devise to 'the poor inhabitants of St. Leonard's Shore Ditch,' is recognized as authority, as well

as that of *Jones v. Williams*, in the same book (Amb. 651). Now, this decision seems full to these points: 1. That the legislature of that state can, *ex post facto*, give a capacity to take a charity, where there was no such capacity existing at the time of devise over, in a case where the future existence of that capacity was not contemplated by the testator; 2. That an act of incorporation, with capacity to take, dispenses with the presence of the representative of the state, in a suit to recover such charity. . . . It is, in general, true that where there is a present immediate devise, there must exist a competent devisee, and a present capacity to take. But it is equally true that if there exist the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise, to take effect in *praesenti*, then, if confined within the legal limits, it is good as an executory devise. . . . Upon the whole, I am of opinion that the act of incorporation was at least equivalent to the king's sign-manual, and vested a good legal estate in the tenant. That although in the interval it should have descended upon the heir, it descended subject to be divested and passed over by that exercise of prerogative power. But I perceive no necessity for admitting that it ever descended ²⁵⁸ upon the heir; since the right of succession seems rather to be in the commonwealth in the case of charities, as *parens patriae*."

Counsel say that the will provides no method by which the beneficiaries shall be selected, and there being no prescribed means by which they can be ascertained as a class or as individuals, the trust is therefore void because of this indefiniteness. The will provides that as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain shall be admitted to the college. And it is said that the word "reputable" is not defined by the testator, and that no person is designated to determine who are entitled to admission as students. In the books it is said the thing given becomes a charity when the uncertainty of the recipient begins. It is no objection, then, to the enforcement of this devise that the beneficiaries are uncertain. But let us see whether the will itself is so vague and uncertain. These words appear in the will of Mr. Clayton: "The college building shall be of stone, substantially built upon a plat of ground of sufficient size to admit of the construction of additional college buildings if the same shall become necessary or expedient. The institution above mentioned shall be established within ten years from and after my

decease as may be practicable in the judgment of my executors. They shall carefully devise and promulgate such rules and regulations as they shall deem proper for the government of the institution and which shall be carried out and be obligatory with the same force and effect as herein set forth at large." This is in our judgment an express authority for the executors of the will of Mr. Clayton to promulgate rules and regulations for the control and management of this college, which shall be obligatory upon the trustees of the college after it is ²⁵⁹ erected and turned over to them, and in the making of these rules and regulations it will undoubtedly be necessary for them to designate how and in what manner the persons to receive the benefits of the college education and to receive the benefits of Mr. Clayton's bounty shall be selected and determined; and if there were no express provisions in his will, we think there is an implied authority granted to the board of trustees of the college to make such rules and regulations, and thereby determine who shall be the recipients of the charity.

In the case of *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, the court had under consideration a devise of the residue of an estate directing that the income be distributed annually "among the worthy poor of the city of Lasalle, in such manner as the court of chancery may direct"; and it was held that the residuary bequest was a valid charitable gift and should be carried into effect by a court of chancery. And further, that in the case of a charitable bequest it is immaterial how vague, indefinite and uncertain the object of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects. Mr. Justice Sheldon, delivering the opinion of the court, at page 276 of 121 Ill., and page 333, 12 N. E., states: "The entire contention in this case arises upon the construction, validity and effect of this residuary clause of the codicil. It is insisted that this clause is void for uncertainty as to the beneficiaries. This is not a bequest to charity generally or to the poor generally, but to the worthy poor of the city of Lasalle. The class here is definite—the worthy poor of the city of Lasalle—but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty as to individuals in the case of public charities, and it is this feature of uncertainty which distinguishes public ²⁶⁰ charities from private charities—charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty is to reject this whole

distinctive doctrine of charitable trusts. . . . In *Hisketh v. Murphy*, 36 N. J. Eq. 304, the testator's will empowered and directed the trustees to employ the annual income of the fund 'for the relief of the most deserving poor of the city of Paterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from said fund.' It was objected that the gift could not be applied to its objects, and was void, because the will did not confer upon anyone the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustee, by the will, to distribute the fund carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely agree with the criticism there made by Chief Justice Beasley, upon the case of *White v. Fisk*, 22 Conn. 31, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustees—that when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection. And this, upon the ordinary doctrine that when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such ²⁶¹ act is, by intendment of law, comprised in such grant of power."

We are therefore of the opinion that not only is power expressly granted by the terms of this will to the executors to designate and appoint persons to be entitled to the privileges conferred by the will of Mr. Clayton, but that the appointment of trustees, granting them authority to control and supervise the college, carries with it by necessary implication the authority to designate the beneficiaries.

"A charity," said Mr. Justice Gray, when of the supreme court of Massachusetts, "in a legal sense, may be fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by

erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

Here, then, is a public charity. Through it Mr. Clayton seeks to bring the minds and hearts of poor orphans under the refining influence of education. After making such provision as he thought proper for the natural objects of his bounty, he has selected, as deserving of his benevolence, the poor white orphan boys of Denver and Colorado, and has devoted the residue of his great fortune to the erection and support of a permanent college for their free instruction and maintenance, that they may become useful citizens and honorable members of society. It is an indulgent, edifying and worthy charity. It will lessen Denver's burdens of government. To thousands of poor orphan boys it will be a blessing forever, and it will be by them forever blest.

Our conclusions, therefore, are: That "the education ²⁶² and preferment of orphans," being one of the subjects mentioned in the statute of 43 Elizabeth, chapter 4, is to be regarded in Colorado as a public charity. That, there being power vested in the executor and the board of trustees of the college to select the objects of the testator's bounty, the trust created by the fourteenth section of the will is valid. That the city of Denver, in its corporate capacity, has power to accept the trust created, and to execute it in accordance with the intention of the testator as declared in the fourteenth section of his will.

For the reasons given, the judgment of the district court is affirmed.

On Charitable Uses in general, see the monographic note to *Dashiell v. Attorney General*, 9 Am. Dec. 577-588. And on charitable trusts in support of educational institutions, see the monographic note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 258-262. Indefiniteness in charitable uses does not necessarily militate against them: *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345; *St. James' Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553, 84 N. W. 273. The certainty and unity required in such trusts are considered in the monographic note to *Fiffeld v. Van Wyck*, 64 Am. St. Rep. 756-772. The doctrine of charitable trusts was a part of the common-law jurisdiction of the English courts of chancery exercising judicial powers only, and as such has been transplanted into the courts of this country possessing common-law equity powers: *St. James' Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553, 84 N. W. 273. It seems to be generally conceded that courts of equity have an original and inherent jurisdiction over charities, independently of the statute of Elizabeth: See the monographic note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 255.

A *Municipal Corporation* cannot hold property in trust for religious purposes: *Maysville v. Wood*, 102 Ky. 263, 80 Am. St. Rep. 355, 48 S. W. 403.

WOOD v. CASSERLEIGH.

[30 Colo. 287, 71 Pac. 360.]

CONTRACT—When not Opposed to Public Policy.—Before a contract can be declared illegal because against public policy, it must clearly appear to be obnoxious to the pure administration of justice, or manifestly injurious to the interests of the public. (p. 140.)

CONTRACT to Furnish Evidence—When Valid.—If one has collected evidence under a contract of employment which does not render his compensation contingent upon the character of the evidence procured nor upon the result of any action in which it may be used, a subsequent contract by him to furnish that evidence to the plaintiff in an action in consideration of a specified interest in the amount recovered, is not void as against public policy. (p. 140.)

CONTRACT to Furnish Evidence—Ownership of the Evidence. If one is employed to collect evidence, and after the death of his employer contracts in his own name to furnish to another party the evidence obtained, the latter cannot, in a suit against him to enforce the contract, raise the question of ownership of the evidence. (p. 141.)

SPECIFIC PERFORMANCE—What will not Defeat.—The specific performance of a contract to furnish evidence and provide for the prosecution of an action in favor of the defendant, in consideration of a part of the judgment recovered, cannot be defeated by showing that the plaintiff did not strictly comply with its terms in advancing money, when the defendant has received and retains the benefits of at least a substantial performance. (pp. 141, 142.)

EQUITABLE ASSIGNMENT—Form of Words.—An Intention to assign on the one side, and an assent to receive on the other, operate as an equitable assignment of the subject matter, if sustained by a sufficient consideration; the form of words is not controlling. (p. 142.)

ASSIGNMENTS of Property to be Acquired in the Future may be enforced by a decree for a specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor. (p. 143.)

EQUITABLE ASSIGNMENT of Interest in Judgment.—If one contracts with the plaintiff in an action to furnish evidence and provide for the prosecution of the cause, for an interest in the judgment recovered, and in accordance therewith the action is prosecuted successfully, the contract constitutes an assignment of an interest in the property recovered. (pp. 142, 143.)

CONTRACT to Furnish Evidence—When not Unconscionable.—A contract with the plaintiff in an action to furnish evidence and provide for the prosecution of the cause, for an interest in the judgment recovered, is not unenforceable in equity on the ground that it yields a return disproportionate to the expenditures in time and money, when there has been no mistake or unfairness, and the party against which it is sought to be enforced has received and enjoyed the benefits. (p. 145.)

DESCENT AND DISTRIBUTION.—A Money Judgment in favor of the wife and five sons of a deceased, to be apportioned among them according to their respective interests as heirs under the laws of descent in Colorado, entitles each child to a one-tenth interest in the judgment. (p. 145.)

APPEAL—Nonprejudicial Error.—A decree will not be reversed for errors not prejudicial. (p. 145.)

H. L. McNair and Thomas, Bryant & Lee, for the plaintiffs in error.

F. J. Mott and George W. Taylor, for the defendant in error.

²⁸⁹ GABBERT, J. Plaintiffs in error, Thomas E. and Charles E. Wood, were the owners of an interest in a mining claim then in the possession of, and for a long time operated by, other parties. Their ancestor was one of the locators of these mining premises. For the purpose of having proceedings instituted to recover their interest in this property, they entered into an agreement with defendant in error, which, though inartificially drawn, in substance recited and provided that the latter was then in possession of the ²⁹⁰ evidence necessary to establish the citizenship of their ancestor, and that in consideration of its production by him, and the prosecution of an action in their behalf upon his part to establish their rights, they were to give him a specified interest in the amount recovered of the parties who had been operating the mining premises, and a like share in any interest which they might recover in such premises. In pursuance of this agreement, defendant in error employed counsel to prosecute an action on behalf of the Woods, with the result that they recovered judgment for a large sum, and also a decree for an interest in the mining premises in dispute. The defendant in error, as plaintiff, brought an action against the plaintiffs in error to enforce his contract. From a judgment in his favor, the latter bring the case here for review.

The first point made by their counsel is, that the contract above referred to is illegal, in that it is contrary to public policy. This is based upon the assumption that from its own terms, and as disclosed by the record, its manifest tendency was to pervert justice. It appears that some time prior to the date when the contract in question was entered into, plaintiff had been employed by another party for the express purpose of collecting testimony which would establish the citizenship of their ancestor; that counsel then employed by this party deemed this question of fact the crucial one, and that unless established, the Woods could not successfully maintain any action; that plaintiff, in pursuance of this employment, learned that deceased had at one time entered government land, in the state of Kansas, and with this clue, ascertained the court before which he had declared his intention to become a citizen of the United States.

It also appears that deceased had been known in Kansas as James Wood. He had located the premises ²⁹¹ in dispute under the name of W. J. Wood, and it was, therefore, necessary to establish that James Wood was the same person as W. J. Wood, the locator. This was shown by parol testimony of parties who knew James Wood in Kansas in connection with a photograph of W. J. Wood, which had been furnished by one of the defendants. This information, it appears, had been collected or the witnesses had been procured who would testify to the facts above referred to, prior to the time when he entered into the contract with the defendants.

Agreements to pay for collecting and procuring testimony of a certain character, to be used in evidence, coupled with the condition that the contractee's right to compensation depends upon the character of the testimony, or the result of the suit in which it is to be used, have been universally condemned by the courts as contrary to public policy, for the reason that such agreements hold out an inducement to commit fraud, or to procure persons to commit perjury. Before, however, a contract can be declared illegal, upon the ground that it is against public policy, it must clearly appear that it is obnoxious to the pure administration of justice, or manifestly injurious to the interests of the public. The usual test to apply in determining these questions is whether the tendency of the contract is evil: 15 Ency. of Law, 934. The contract in question does not show upon its face that plaintiff was to procure testimony of any certain character, or furnish sufficient to establish the principal question of fact which was deemed material; but, on the contrary, simply required him to furnish evidence which was then in his possession, and which he had secured prior to the execution of the contract. It appears that plaintiff collected this testimony under a contract with the party by whom he had been employed, which in no manner rendered his ²⁹² compensation contingent upon the character of the testimony which he had been employed to procure, or the result of any action in which it might be used. On the contrary for the services thus performed he was paid, or promised, a specific compensation in no manner contingent upon his success. It cannot be said, therefore, that the agreement of the plaintiff to furnish the testimony referred to in the contract, or any act upon his part in securing it, would involve the commission by him or by any other person, of any act having the slightest taint of immorality or which would be obnoxious to the pure administration of justice, or injurious to public interests,

and therefore is not void as against public policy: *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024.

The next point made by counsel for defendants is, that plaintiff did not own the evidence which he agreed to furnish. It appears that previous to entering into the contract he was employed by one Peter Finnerty to collect this testimony. After the death of the latter he entered into the contract in his own behalf, and filed a claim against the Finnerty estate. An allowance was made, which was afterward compromised. The defendants are not in a position to raise the question regarding the ownership of the evidence. The estate cannot maintain an action against them on this account. The representatives of deceased have not intervened. No attempt was made to bring them in as parties to the action. The testimony was furnished by the plaintiff, as agreed. In such circumstances, whatever the rights of the representatives of deceased may be is a question solely between the plaintiff and such representatives, and therefore one with which the defendants have no concern.

It is claimed by counsel for defendants that plaintiff is not entitled to a specific performance of his contract for the reason that he did not advance ²⁰⁸ the money necessary to carry on the litigation. Whatever the requirements of the contract may have been in this respect is immaterial. The suit was commenced by counsel employed by plaintiff and prosecuted to a successful termination. Counsel thus employed was paid by him by an assignment of an interest in his contract with the Woods. While the contract may have been unilateral in the first instance, and specified various matters which plaintiff was required to perform, its main purpose was to provide for the prosecution of an action for the recovery of the interest of the defendants. This has been done, and has resulted in a judgment in favor of the Woods. Hence, the contract is now mutual and obligatory upon each: *Frue v. Houghton*, 6 Colo. 318. Defendants may have demanded the money which they claim the plaintiff was to furnish, and may have, in fact, advanced it themselves; they never claimed, however, during the pendency of the action, to terminate the contract, but, on the contrary, continued to have the cause prosecuted under the arrangement which plaintiff had made with counsel. If they advanced money which they were not required to advance, or have been damaged on account of the plaintiff's failure to do so, they cannot rescind now that the contract is completed, and they have accepted the benefits, when they failed during the period he was in default, to take

advantage of his delinquency. In other words, they have received and retained the benefits of at least a substantial, partial performance of the contract on the part of the plaintiff, and they cannot now defeat its specific performance by showing that he has not strictly complied with its terms and conditions: *Kauffman v. Raeder*, 108 Fed. 171; *German Savings Inst. v. De La Vergne Ref. Mach. Co.*, 70 Fed. 146.

In the suit brought by the Woods, judgment was ²⁹⁴ rendered in their favor against the parties in possession of the mining premises for a sum which represented their interest in the ores theretofore extracted, and also for their interest in such premises. To the present action plaintiffs in error, Wheeler and the Aspen Mining and Smelting Company, were made defendants, and judgment rendered against them for the amount which the court found plaintiff was entitled to recover from the Woods as his part of the judgment in their favor, which represented their share of the value of the ores extracted, and also for his proportion of the interest recovered by them in the mining premises. The judgment, it is urged, is erroneous as to the defendants, Wheeler and the mining company, for the reason that the agreement between the Woods and plaintiff did not constitute an assignment from the Woods to plaintiff in the property recovered. The contract recites that: "We, the parties of the first part (the Woods), each for ourselves, do hereby agree to give unto said party of the second part (plaintiff) a two-thirds (2-3) interest in and to the amount recovered for us through law, if legal proceedings are commenced, and if a settlement is had without legal proceedings then and in that case the said second party, or his assigns, is to receive a one-quarter ($\frac{1}{4}$) interest of all our said interest in and to the amount recovered by such settlement."

An intention to assign on the one side, and an assent to receive on the other, operate as an equitable assignment of the subject matter of transfer, if sustained by a sufficient consideration. The form of words used is not alone controlling, but all the circumstances of the transaction are to be considered in determining the intention of the parties to such an agreement: 1 *Beach's Equity*, sec. 326; *Johnson Co. v. Bryson*, 27 Mo. App. 341; *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171; 2 *Story's Equity Jurisprudence*, sec. 1047; ²⁹⁵ *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233; *Fairbanks v. Sargeant*, 39 Hun (N. Y.), 588.

The language employed in the contract itself is not a mere offer on the part of the Woods to pay plaintiff a sum out of

the recovery, but an offer and promises to assign him a specific interest in such recovery. A resort to extrinsic circumstances proper to consider in connection with the language of the contract manifests this intention of the parties still more clearly. The judgment which might be recovered on the part of the Woods on account of their interest in the ores extracted would be of no value unless it could be collected from the parties against whom rendered. This, it was known, would represent a large sum if the Woods prevailed. They surely did not contemplate, although they were not financially responsible, that any proportion of this judgment would represent the sum which they would be compelled to pay the plaintiff without regard to the amount which might be realized upon their judgment. No value was fixed, or could have well been settled, in advance for the interest in the mine to which they were entitled, and the parties must have necessarily understood that in this part of the recovery the plaintiff was to have a specified interest. A specific share in a specific property was what the parties contemplated. This was to be the compensation of plaintiff, and nothing more. The subject matter of assignment was not in existence at the time the contract was executed, but assignments of property to be acquired in the future may be enforced by a decree for a specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor, provided the assignee has performed his part of the contract: 1 Beach's Equity, sec. 328.

It is next contended that the amount to which the plaintiff is entitled under the terms of his contract is ²⁹⁶ so disproportionate to the expenditures in time and money upon his part that the contract is not enforceable in equity. There does not appear to have been any omission or mistake in the agreement, nor has there been any concealment, misrepresentation or any unfairness disclosed on the part of the plaintiff. Neither does it appear, when considered in the light of the facts and the information upon which the parties acted at the time the agreement was executed, to be either unconscientious or unreasonable. Plaintiff was in the possession of testimony which all the parties regarded at that time of such supreme importance that in all probability no suit would ever have been commenced on their behalf had it not been for the information on this subject then in plaintiff's possession. At that time the statute of limitations would have barred the claim of the Woods within a few months. Plaintiff assigned an interest in his con-

tract, which the Woods recognized in compensating counsel employed to prosecute their action. In short, it appears, so far as advised from the record, that except for this contract which they entered into with plaintiff, and the information which the plaintiff had collected as to the citizenship of the deceased locator, no action would ever have been commenced to recover this interest, and the Woods, instead of having an interest in what at least was supposed at one time to be a valuable mine, and a money judgment for a large sum, would have had nothing. While the proceeding was being prosecuted, the Woods must have been as fully advised regarding the terms and conditions of the contract which they entered into with plaintiff, the benefits which they derived, or expected to derive under this arrangement, and the steps which he took in carrying it out, as they were after final judgment was rendered in their favor; and yet, during all that period, they do not appear to ²⁹⁷ have made the slightest objection to the contract, or to have intimated that they were in any manner misled in entering into it, or that it was unconscientious or unreasonable. In the face of this silence, and the acceptance of the benefits which they have enjoyed by virtue of the judgment obtained, in connection with the fact that all parties appear to have entered into the agreement in good faith, it is too late to raise the question that the contract should not be enforced because of a want of consideration, or is unconscionable and unreasonable.

It is contended the decree is excessive for the reason that there was a one-twelfth, instead of a one-tenth of the original money judgment coming to each of the Woods. This claim is not tenable. According to the original decree, the money judgment was rendered in favor of the wife and five of the sons of the deceased, William J. Wood, to be apportioned among them according to their respective interests as heirs of deceased under the laws of descent in this state. This would give each of the Woods who appear as plaintiffs in error here a one-tenth interest in such judgment.

It appears that in settlement of the judgment originally rendered, the Woods received, as part consideration, a conveyance of certain mining property. The judgment rendered against the defendants was made a lien upon this property, with the provision that the unsatisfied balance should be paid by Wheeler and the mining company. It is asserted that the establishment of the lien is erroneous. Conceding this to be true, the parties are not in a position to complain. Wheeler

and the mining company were personally responsible for the money judgment rendered in favor of plaintiff, and they certainly are not prejudiced by a decree which limits their personal responsibility to the sum remaining unsatisfied after ^{the} the property upon which the lien was established has been sold to apply upon the judgment. Neither are the Woods injured. The decree of the court gives no greater rights to plaintiff in the way of a lien than he could have secured by filing a transcript of the judgment with the clerk and recorder of the respective counties in which the mining property is situate, or by levying under an execution. A decree will not be reversed for errors which are not prejudicial.

The judgment of the district court is affirmed.

Steele, J., not sitting.

A *Contract* identical in its terms with that involved in the principal case, but signed by James O. Wood of Wisconsin, was before the United States circuit court of appeals in the eighth district, and was there held not to be specifically enforceable by a court of equity: See *Casserleigh v. Wood*, 119 Fed. 308. On champerty and maintenance in general, see the monographic notes to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316-322; *Shirk v. Neible*, 83 Am. St. Rep. 159-187.

THE VALIDITY OF CONTRACTS TO FURNISH EVIDENCE.*

- I. Generally Held Invalid.
- II. Effect of Good Faith.
- III. Evidence Produced by a Public Officer.
- IV. Cases Holding Them Valid.
- V. Agreements for Clemency in Criminal Prosecutions.
- VI. Expert Testimony.
- VII. Restoring Competency of Witnesses for Purposes of Suit.
- VIII. Where Indirectly Used as a Witness.
- IX. Promise to Pay More Than the Legal Fee.

I. Generally Held Invalid.

As a general proposition of law, contracts to procure evidence are considered invalid as interfering with the due administration of justice, and therefore contrary to public policy. An agreement to furnish evidence to establish the claim of a party to an action about to be commenced is void on that account: *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281; as is also a stipulation to procure witnesses to swear to a particular fact: *Patterson v. Donner*, 48 Cal. 869.

In some cases witnesses are promised a certain sum or a fixed percentage of whatever may be recovered in return for their testimony.

*REFERENCE TO MONOGRAPHIC NOTE.

Contracts for the production or discovery of evidence: 94 Am. Dec. 375.

Am. St. Rep., Vol. 97—10

In *Stanley v. Jones*, 7 Bing. 369, Chief Justice Tindal said: "The question upon the present record is this: whether the contract stated in the deed upon which the action is brought is a legal contract, capable of being enforced by a court of law. The deed recites that Stanley had given the defendant reason to believe that certain representations made to him were false; and that Stanley, being in possession of evidence to manifest the same, had agreed to communicate such evidence to the defendant upon receiving from him a certain sum expended in obtaining the same, and upon having an agreement by the defendant to pay him one-eighth part of the clear amount of such sums as the defendant should recover through the means of Stanley.

"The agreement, therefore, is, in effect, a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of the production of that very evidence. And we all agree in thinking such an agreement cannot be enforced in a court of law.

"Now in the present case, Stanley does purchase an interest in the subject matter of dispute, not in terms in deed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not indeed stipulate that he is to furnish money for the carrying on the suit, or that he is to carry it on himself, but he stipulates that 'he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant.' And if there is any difference between this contract and direct champerty, it appears to us to be strongly against the legality of this contract; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the utmost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice."

So where a party promised to pay a witness a sum of money to attend, only one-half of which was to be paid him if the party promising lost the suit, such agreement is unenforceable: *Dawkins v. Gill*, 10 Ala. 206.

An interesting case of this character is *Gillett v. Logan County*, 67 Ill. 256, where county authorities agreed to pay a party to procure testimony for the county, for use in a suit against it. He was to receive a graduated price for each number of votes shown to be illegal, and an additional sum if the court should decide in favor of the county. This contract was held to be void, in the following words: "The evidence disproved the actual use, by the committee,

of any corrupt means, or any corrupt design, on their part, in the use of the money.

“But the contracts, themselves, are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed, that testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other ‘base appliances’ in order to secure the necessary results which were to bring to these agents their stipulated compensation.

“The tendency of such arrangements must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency, as is constituted by these contracts, should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end.”

So where one enters into a conspiracy with another to defraud the government, and incidentally a third person, if the former agree for a certain amount to supply such third person with evidence of the conspiracy in a contest concerning the land, such contract is invalid, and notes given therefor unenforceable: *Hagan v. Wellington*, 7 Kan. App. 74, 52 Pac. 909. That an agreement to procure evidence is no consideration for a promise, see, also, *Parker v. Baylis*, 2 Bos. & P. 73; and it will not be specifically enforced: *Powell v. Knowler*, 2 Atk. 224.

II. Effect of Good Faith.

It is not the contract itself to which the courts are opposed, for it may be entered into in all fairness by both parties, and no wrong contemplated; but it is the tendency of the agreement which causes it to be eyed with disapproval: *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, 33 N. E. 44, affirming 44 Ill. App. 351. So where the consideration of a reward for the recovery of money is that such person shall testify on behalf of the one offering it, although not actually corrupt, it is illegal: *Boehmer v. Foval*, 55 Ill. App. 71. In *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647, 36 Pac. 1077, there was a contract to procure evidence on commission, the plaintiff claiming eighteen hundred dollars. While no actual wrong was contemplated, and the acts in carrying it out were innocent and lawful, its very tendency to injustice condemned it. “The law does not tolerate the offering to anyone, no matter how virtuous, of such temptations to crime.”

Wellington v. Kelly, 84 N. Y. 543, agrees with these cases in holding them dangerous in their tendency, although in that case a contract to furnish evidence was upheld, the party who was to furnish

it not being a stranger in interest to the subject of the litigation, and no illegal or improper intent on the part of the parties appearing.

III. Evidence Produced by a Public Officer.

Another kind of contract of this class, and one which has even less to recommend it, is where a person occupying a fiduciary position agrees to disclose facts coming within his knowledge on account of occupying such position. In *Lucas v. Allen*, 80 Ky. 681, a city official had charge of an ordinance on the authority of which illegal assessments were levied, and he professed to have information which would lead to the recovery of those taxes by taxpayers. The court there said: "We are of the opinion that Lucas, who was an official of the city charged with the custody and power to copy and attest the very ordinance on the authority of which the illegal assessments against the citizens were made, was forbidden by public policy to make the contract, whereby, if enforced, he would receive money for the disclosures he made, and the services he rendered against the interest of the city, whose employment he was in, and to which the law requires him to be loyal and true, so long, at least, as in that employment, and in so far as it furnished him, in the course of his duties, information by which he sought or may seek to profit himself: *Steele v. Curle*, 4 Dana, 581; *Oscanyan v. Ames Co.*, 103 U. S. 262."

An agreement to pay for evidence leading to the conviction of persons implicated in the commission of a crime is not illegal as contrary to public policy where the person furnishing the evidence is a deputy sheriff, if the crime was committed and the trial had in another county than that in which he was an officer: *Harris v. More*, 70 Cal. 502, 11 Pac. 780.

IV. Cases Holding Them Valid.

That contracts to procure evidence have not been universally condemned may be seen from the principal case: *Wood v. Casserleigh*, 80 Colo. 287, 71 Pac. 360; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024. The contract which in those cases was held valid was held invalid by the United States circuit court of appeals in *Casserleigh v. Wood*, 119 Fed. 308, but it proceeded along the lines of champerty and maintenance, and the validity of contracts to supply evidence was not discussed independently of those questions.

Where, however, a contract to furnish testimony is linked with an agreement to suppress testimony, it is void: *Young v. Thomson*, 14 Colo. App. 294, 59 Pac. 1030.

In *Lucas v. Pico*, 55 Cal. 126, information of an outstanding title to real property, adversely held by another is a sufficient consideration to support a promissory note, there being nothing immoral in such a transaction: See, also, *Chandler v. Mason*, 2 Vt. 193. In *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, it was held that a contract to give information in respect to evidence was not illegal. In *Wilkinson v. Oliveira*, 1 Bing. N. C. 490, 1 Scott, 46, a person who furnished an-

other with a letter to be used in evidence was entitled to recover on a promise to give part of the proceeds, but the question of the illegality of such an agreement does not appear to have been raised.

V. Agreements for Clemency in Criminal Prosecutions.

An agreement by a prosecuting attorney for immunity or clemency to several defendants, on different indictments, if one of them would become a witness for the prosecution upon other indictments, is a fraud upon the court: *Wright v. Rindskopf*, 43 Wis. 344. The court there said "Any agreement of a public prosecutor with an accomplice becoming a witness, for any advantage to the accomplice beyond his immunity upon the indictment upon which he testifies, or for immunity or clemency to other persons indicted with him, on the same or any other indictment, would not only be beyond the official authority of a public prosecutor, but would be an obstruction of the administration of public justice which no court could sanction or countenance. When indictments are several, for several offenses, we know of no practice, of no case in the books, to sanction or countenance any suggestion of the public prosecutor for immunity or clemency to the defendant on one indictment, on condition of his giving evidence for the prosecution on others; far less for immunity or clemency to several defendants, in several indictments, upon one of them becoming a witness for the prosecution upon still other indictments. We are not prepared absolutely to say that there might not be extraordinary circumstances in which judicial sanction might be given to an understanding with the defendant in several indictments, becoming a witness for the prosecution on one, with promise of pardon on all, in order to secure conviction for great crime, by suffering less crime to go unpunished.

"We are strongly inclined to think, however, that any such agreement should be regarded as working corruption in the administration of public justice beyond justification by any exigency. But if any sanction could be given to such an understanding, it could be given only by the court in which the indictments are pending, upon fullest and most explicit knowledge of the understanding and of the circumstances leading to it. Any such agreement of a public prosecutor with a person under indictment, unsanctioned by the court, would be a fraud upon the court and an obstruction of public justice."

But where one is jointly indicted with others, an agreement by him to testify fully, in return for which the facts will be presented to the court, and a nolle prosequi as against him recommended, is not contrary to public policy; for he simply consents to make a disclosure of the truth, and has no inducement to produce any special result: *Nickelson v. Wilson*, 60 N. Y. 362, reversing 1 Hun, 615.

VI. Expert Testimony.

Agreements to pay witnesses on the event that the suit terminate in favor of the promisor are not only void as concerning ordinary

witnesses, but also as concerning experts. In *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154, a doctor was employed by a person injured in a railroad accident to explain his injuries to the management of the company, his fee to depend upon the amount recovered. This the court held illegal saying: "However honest a man's actual intentions may be, and however truthful he may be, there is a direct temptation to misrepresent, and a direct danger that the misrepresentation will operate injuriously to the parties dealt with."

So a contract to pay a patent expert a large sum of money if his testimony produced a certain result, is an agreement tending to pervert the course of justice: *Pollak v. Gregory*, 22 N. Y. Super. Ct. (9 Bosw.) 116.

In *Yeatman v. Dempsey*, 7 Com. B., N. S., 628, a medical man was mulcted in damages for breaking a contract to appear at a trial and testify, but the question of illegality did not enter into the matter at all.

VII. Restoring Competency of Witnesses for Purposes of Suit.

Agreements to restore the competency of a witness otherwise incompetent are a fraud both upon the adverse party and the court. So where, for the purpose of rendering a witness competent, a release is given him, with the agreement that after he had been examined on the trial, it should be delivered up and canceled, neither party can come into court seeking relief against the other because he has not carried out his agreement: *Crosier v. Acer*, 7 Paige, 137. A guaranty for the payment of a note, although substituted for another guaranty, in order that the first might be called as a witness on a suit on the original debt, is not void for maintenance: *Small v. Mott*, 22 Wend. 403, affirming *Mott v. Small*, 20 Wend. 121. See, also, *Dorwin v. Smith*, 35 Vt. 69.

VIII. Where Indirectly Used as a Witness.

In *Grove v. McCalla*, 21 Pa. St. 44, one owed another a debt, and promised to pay him when he received money in a certain suit of his pending against a third person, if he would wait till then. The fact that the creditor was afterward examined in that suit as a witness for the debtor does not invalidate the promise to pay. And in *Perry v. Dicken*, 105 Pa. St. 83, 51 Am. Rep. 181, a contract was declared valid between a client and his attorney acting on a contingent fee, although it was then understood that the attorney would be a necessary witness for his client at the trial.

IX. Promise to Pay More than the Legal Fee.

Another class of contracts is that in which a witness is offered more than the legal fee for attending court and testifying. Ordinarily, they cannot recover on such agreements. "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would be room for oppressive conduct, and for corruption. Witnesses, know-

ing that their testimony was indispensable, would, under one pretense or another, make terms for their testimony, and such as might be induced to represent their testimony as important, would be tempted to barter their oaths at the expense of truth and justice. Now, a promise to pay more than the statute fees for just this statute service, without further service or loss by the witness, may be said to be without consideration. It cannot be important, in our view, whether the promise be made after the service of the subpoena, contemporaneously with it, or before, provided the promise refers to this duty and is founded on no other consideration.

“There may be a further consideration, in which case an executory promise for extra compensation will be upheld; as if the witness was about going abroad at the time he may be wanted to attend court, and agrees that he will remain and give up his journey and is summoned; or living at a distance from the place of the court, more than twenty miles, so that his deposition could be taken, agrees that he will attend in person. In these and the like cases the promise is one for indemnity, and is founded on a new and meritorious consideration, and is good. . . .

“If a witness agrees with a party, that he will attend and testify without being summoned, and he is not summoned and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute”: *Dodge v. Stiles*, 26 Conn. 463. See, also, *Willis v. Peckham*, Brod. & B. 15.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BRUNSWICK AND WESTERN R. R. CO. v. PONDER.

[117 Ga. 63, 43 S. E. 430.]

CARRIER—Duty to Protect Passengers.—A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence or injury by third persons. (p. 153.)

CARRIER—Duty to Protect Passenger from Arrest.—When a passenger on a train is being arrested by officers of the law, under color of authority, the railroad company is under no duty to inquire into the legality of the arrest. (p. 154.)

CARRIER—Liability for Arrest of Passenger.—When the arrest of a passenger is apparently regular, and there is nothing to put the railroad company on notice that the arrest is illegal, it is not liable for failing to interfere with the officers and prevent the arrest, or for stopping the train to allow the removal of the prisoner. (p. 155.)

CARRIER—Liability for Excessive Force in Arrest of Passenger.—If the arrest of a passenger on a train is made under such circumstances that the conductor may assume that it is lawful, the railroad company is not liable for excessive force used by the officers. (p. 155.)

W. E. Kay, S. W. Hitch and John C. McDonald, for the plaintiff in error.

John T. Myers, for the defendant in error.

63 SIMMONS, C. J. Sometime in June, 1901, Ponder boarded a passenger train of the Brunswick and Western Railroad Company at Fairfax, Georgia. He paid his fare to Waycross. When the train stopped at Waresboro, a station intermediate between Fairfax and Waycross, three men boarded the train, assaulted Ponder, and removed him from the train. After set-

ting for a small sum his claims against the individuals who assaulted him, Ponder brought suit against the railroad company for its failure to protect him. The jury returned a verdict for the plaintiff for five hundred dollars. The company⁶⁴ moved for a new trial, the judge overruled the motion, and the company excepted. The evidence shows that when the train stopped at Waresboro the conductor stepped off to assist the passengers who were getting on or off. While he was so engaged, three men boarded the train to arrest Ponder, entering the train at a point other than that at which the conductor was standing. One of these men was marshal of the town of Waresboro, another was the deputy marshal, and the third was specially deputed by the marshal to assist in making the arrest. They had no warrant, and seem to have arrested Ponder for having failed to pay one of them a debt. They ordered him to get off of the train with them, and, upon his refusal, began to strike and beat him. At this juncture the conductor came in and discovered, for the first time, that the officers were on the train making an arrest. He took hold of one of them and remonstrated with them all, suggesting that they go on to Waycross, the train having already started. This they refused to do, ordering the conductor to stop the train. The conductor, when he came in, had heard Ponder tell the officers that he had paid them all he owed them; but the conductor made no investigation as to the charge against Ponder, and did not try to ascertain whether the officers had a warrant. He knew that the officers were such, and they had on former occasions arrested persons on his train and taken them off. Upon their demand he had the train stopped before it had left the corporate limits of the town. The officers and Ponder then left the train. The motion for new trial complains that the verdict is contrary to the evidence and without evidence to support it, and that the court erred in certain charges and refusals to charge. Our idea of the law of the case, as given below covers these assignments of error, and we will not deal with them separately.

1. A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence or injury by third persons. If a third person boards the train and assaults a passenger, it is the duty of the railroad company to use extraordinary care to protect the passenger, and in this state the conductor of a train carrying a passenger is invested with all the powers of a police officer:

Pen. Code, sec. 902. At the same time, a conductor would not be justified in interfering with the lawful arrest of one who happened to be a passenger on his train. This ⁶⁵ much is clear. The present case, however, falls within an intermediate class. The arrest of Ponder was not a lawful one, but of this fact the officers of the railroad company had no notice. The arrest was made by officers of the law, acting under color of their office, and we think the company was under no duty to inquire into the legality of the arrest. The arrest was apparently regular, and, in the absence of any knowledge or notice to the contrary, the officers and agents of the company could assume that it was lawful. The conductor knew that the men making the arrest were officers, and he had previously had passengers on his train arrested by them and removed from the train. While the officers were attempting to arrest Ponder, the latter told them in the hearing of the conductor that he had paid them all he owed them. This was not of itself sufficient to put the conductor on notice that the arrest was for a debt. So far as he knew it was a claim by Ponder that he had restored all of the money which he had acquired by the commission of some crime with which he was charged, or that he had attempted illegally to settle some criminal prosecution. The arresting officers had no warrant, but in this state an officer may arrest without warrant an offender who is attempting to escape. Further than this, the conductor did not know of the absence of a warrant, and Ponder did not raise that question or represent to the conductor that the arrest was unlawful or unauthorized.

2. The conductor made a decided effort to quiet the disturbance on the train and to stop the assaults on Ponder. One of the plaintiff's witnesses testified that the conductor did all that he could have done. However this may be, we think the failure of the conductor to interfere with the officers and prevent the arrest did not give Ponder any cause of action against the company. It is essential to the maintenance of the law that its processes should be promptly executed and its officers allowed to proceed without interference, except in cases where such interference is clearly justified. It would never do to allow a railroad conductor to interfere with officers of the law and prevent arrests by them merely because he did not know whether or not they were acting within their power and authority. If the conductor had knowledge that the arrest was unlawful, then it would be his duty to use extraordinary diligence to prevent it and protect the passenger, but even in that

case the company would not be an insurer against such arrest. If ⁶⁶ the conductor had notice that the arrest was wrongful, it would be his duty to make inquiry into the matter. But where the arrest is by officers of the law and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest. It was argued that the conductor had also actively aided in the arrest by stopping his train to enable the officers to remove their prisoner. This is answered by what has been said above. The conductor was ordered to stop the train, and, as he had a right to presume that the arrest was legal, his obeying the command of the officers was no breach of duty to the passenger. An officer may stop a train to make an arrest of a person thereon: *St. Johnsbury etc. R. R. Co. v. Hunt*, 60 Vt. 588, 6 Am. St. Rep. 138, 38 Am. & Eng. R. R. Cas. 307, 15 Atl. 186. And certainly an officer may, after having made the arrest, stop the train to remove his prisoner. It would have been an interference with the officers to have carried them on out of their town while they were endeavoring to make an arrest within it. In this particular case it further appears that, at the time the train stopped upon the command of the officers, Ponder had ceased resisting and agreed to get off.

3. One other question remains: Was the railroad company liable for allowing the arresting officers to use more force than was necessary to make the arrest? Ponder appears to have been considerably beaten and bruised, and the evidence would warrant a finding that more force was used to make the arrest than was necessary, and that this was evident to the conductor or to anyone else who was present. It was argued that, even if the company was under no duty to prevent the arrest, it was still liable for not seeing to it that no unnecessary force was used. In the first place the conductor seems to have done what he could to prevent this, and but little force was used after he arrived upon the scene, the violent assaults having occurred before he discovered what was going on or had time to take part. Nor is there any evidence of negligence on the part of the company's agents in not sooner discovering that the officers were on the train endeavoring to arrest Ponder. Then, too, if our conclusion be correct that the conductor could assume that the arrest was a lawful one and was under no duty to prevent it, we think the company cannot be held liable for ⁶⁷ the excessive force used. Ponder became the prisoner of

the officers as soon as they laid hold on him and before he was removed from the train. He was taken out from under the protection of the conductor as against the officers of the law. He was then in the custody of the law, and, whether or not the conductor or anyone else was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger: See, in this connection, *Jardine v. Cornell*, 50 N. J. L. 485, 14 Atl. 590, 34 Am. & Eng. R. R. Cas. 307.

Judgment reversed. By five justices.

A Carrier must Protect Its Passengers from the assaults, insults, and ill-treatment of their fellow-passengers, strangers, and its own servants: *United Railways etc. Co. v. Deane*, 93 Md. 619, 86 Am. St. Rep. 453, 49 Atl. 923; *Haver v. Central R. R. Co.*, 62 N. J. L. 282, 72 Am. St. Rep. 647, 41 Atl. 916; *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298, 52 N. E. 747; *Birmingham Ry. etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456; *Savannah etc. Ry. Co. v. Quo*, 103 Ga. 125, 68 Am. St. Rep. 85, 29 S. E. 607; *White v. Norfolk etc. R. R. Co.*, 115 N. C. 651, 44 Am. St. Rep. 489, 20 S. E. 191; monographic notes to *Rommel v. Schambacher*, 6 Am. St. Rep. 734-737; *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 90-101; *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 89; but it is not bound to protect them from arrest by officers of the law: *Owens v. Wilmington etc. R. R. Co.*, 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259; monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 426, 427.

ROBINSON v. GEORGIA RAILROAD AND BANKING CO.

[117 Ga. 168, 45 S. E. 452.]

BASTARDS are not "Children."—Prima facie, the word "child" or "children," when used in a statute, will, or deed, means legitimate child or children; bastards are not within the term "child" or "children." (p. 157.)

DEATH.—A Statute Giving a Right of Action for a homicide should be construed strictly. (pp. 157, 164.)

DEATH.—The Mother of an Illegitimate Child has no right of action, in Georgia, for its wrongful or negligent homicide. (p. 164.)

Arnold & Arnold, for the plaintiff.

Joseph B. and Bryan Cumming and Sanders McDaniel, for the defendant.

¹⁶⁸ FISH, J. This record presents but a single question for our determination, and that is, Has the mother of an illegitimate child a right of action, under the Civil Code, section 3828,

for his wrongful or negligent homicide? That section reads as follows: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said ¹⁰⁰ child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child." In seeking for the true meaning of this section as to the question under consideration, we must be guided by two firmly established and familiar rules of construction: 1. That statutes in derogation of the common law are to be strictly construed; and 2. That, *prima facie*, the word "child," or "children," when used in a statute, will, or deed, means legitimate child or children; in other words, bastards are not within the term "child" or "children." This court on several occasions, in construing this very section, has applied to it the first of these rules. In *Smith v. Hatcher*, 102 Ga. 158, 29 S. E. 162, it was held: "It is essential to the maintenance of an action by a parent for the homicide of his child that the former should, at the time of the homicide, be to a material extent dependent upon the latter for a support, and that the child should then be actually contributing thereto." In the opinion Lumpkin, P. J., said: "The statute giving a right of action to a parent for the homicide of a child, and conferring upon the former the right to recover the full value of the child's life, is, to say the least, a harsh one, and must be strictly construed." Substantially the same language is used by the learned justice in *Georgia R. R. Co. v. Spinks*, 111 Ga. 573, 36 S. E. 835. In *Marshall v. Macon Sash Co.*, 103 Ga. 725, 68 Am. St. Rep. 140, 30 S. E. 571, it was held: "A child has no right of action for the homicide of its stepfather." In that case it was alleged that the plaintiffs were the only heirs of their stepfather, he having left no widow and no other children; that he mar-

ried the mother of the plaintiffs eight years prior to his death, and from the time of such marriage to the date of his death he maintained and supported the plaintiffs as his children, rearing them in his own home, feeding, clothing, and schooling them, and exercising over them complete parental control, by consent of their mother and themselves; and that such relation continued up to the date of his death, up to which time he not only contributed to their support, but they were entirely dependent upon him for a livelihood. The action was dismissed on general demurrer. Mr. Justice Lewis said: "The right of action provided for in the above code section [3828] did not exist at common law. The statute is, therefore, in derogation of the common law; and applying to it the universal rule of strict construction, we cannot see how there is any escape from the conclusion ¹⁷⁰ that the legislature never contemplated giving a child any right of action for the homicide of a stepfather."

Instances of the application by this court of the second of these rules of construction are *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153, *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451, and *Johnston v. Taliaferro*, 107 Ga. 6, 32 S. E. 931. In the first of these cases it was held: "Where, by the provisions of a will made by the great-grandfather of a bastard on the paternal line, an estate is vested in the father of a bastard for life with remainder over to his children, and, he failing issue, remainder over in fee to other great-grandchildren of the testator, upon the death of the father of such bastard without issue other than such legitimated bastard, while the latter, by force of the statute, may take by descent from his father, he cannot take by purchase under the will of his great-grandfather, which devises the estate to his great-grandchildren generally, there being in the will no language expressly indicating a purpose to include within the scheme of his benevolence any bastard descendants." Mr. Justice Atkinson, in that case, said: "The word 'children,' as a general rule, means legitimate children, and will not be extended by implication so as to embrace children other than legitimate, unless such construction be necessary to carry into effect the manifest purpose of the testator." In the second case it was held: "The term 'child,' as employed in section 2664 of the code, does not include a bastard so as to entitle him to the benefits of its provisions, and the conclusive presumption of a gift resulting from continuous possession, under the circumstances therein set forth, arises only in favor of legitimate

children." In the opinion Chief Justice Simmons said: "It is well settled that at common law the words 'child' and 'children' mean only legitimate child and children." In the third case it was held: "The words 'child' and 'children,' appearing in a deed conveying to an unmarried female certain property during her life, and at her death to such child or children as she may leave living at the time of her death, will not include an illegitimate child of such female born several years after the making of the deed, unless it plainly appears from the language of the instrument that it was the intention of the grantor that an illegitimate child was to take thereunder. The word 'issue,' used in a subsequent part of the deed under consideration in the present case, is to be given the same meaning as the words 'child' or 'children.'" Mr. Justice Cobb, in delivering ¹⁷¹ the opinion, said: "The words 'children' and 'issue' in deeds, wills, and other conveyances must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates": 107 Ga. 20, 32 S. E. 937.

The exact question we have in hand has been decided by courts in other jurisdictions, and upon the application of the two rules of construction under discussion. In *Dickinson v. Northeastern Ry. Co.*, 2 Hurl. & C. 735, it was held that the word "child," in section 2 of 9 & 10 Victoria, chapter 93 (Lord Campbell's act, which is the prototype of our statute), means a legitimate child; and that an action could not be maintained on behalf of a bastard child against a railway company for the homicide of its mother. Counsel for the plaintiff in that case contended that the case was within the spirit of the act, for beyond question the child was dependent solely on the mother, and that the act must mean any child who was deriving pecuniary advantage, and is deprived thereof by the death. Pollock, C. B., said: "We have no doubt that in the act of parliament, as in all others, the word 'child' means 'legitimate' child only." In *Gibson v. Midland Ry. Co.*, 2 Ont. 658, it was held, under a statute of Ontario similar to Lord Campbell's act, the mother of an illegitimate child could not recover damages for its death. To the same effect is *Clarke v. Carfin Coal Co.* (Scotland), [1891] App. Cas. 412. In *Harkins v. Philadelphia etc. R. Co.*, 15 Phila. 286, it was held: "The mother of an illegitimate child is not within the words or meaning of the act of April 26, 1855, which enacts that the persons entitled to recover damages for any

injury causing death shall be the 'husband, widow, children, or parents of the deceased, and no other relative.' " In his opinion, Thayer, P. J., after citing *Dickinson v. Northeastern Ry. Co.*, 2 Hurl. & C. 735, said: "The line of argument adopted by the plaintiff's counsel in that case was much the same as that pursued by the plaintiff's counsel in the present case, viz., that the legislature intended the right of action to be coextensive with the moral right to support; that, for many purposes, the law recognizes the relationship of a bastard child to his parent; and that, therefore, the question of legitimacy or illegitimacy is immaterial. But we are not convinced by this reasoning. ¹⁷² It is true that some rights have been accorded by statute to illegitimate children and their mothers which did not exist at common law. The act of 27th of April, 1855, section 3 (Purdon's Digest, 810), enacts that illegitimate children shall take the name of the mother, and that they and the mother respectively shall have capacity to take or inherit from each other personal estate as next of kin and real estate as heirs, but this act conferred only limited powers upon persons of this description. It did not legitimate illegitimate children, and it was so ruled by the supreme court of this state," citing cases. In conclusion the learned justice said: "In addition it may be observed that, by the act of 26th of April, 1855, the right of action is given, not to the mother alone, but to the 'parents' of the deceased. If the effect of the act of 27th of April, 1855, were to legitimate bastards for all purposes, and to give to them and their natural parents the standing in all respects which the law accords to lawful children and lawful parents, then the natural father would equally with the natural mother be within the enabling words of the act. We do not think this to have been the purpose of the law, but are of the opinion that the legislature, in enacting the act of 26th of April, 1855, and when using the words 'husband, widow, children, parents of the deceased, and no other relative,' had in view the family relation as constituted and recognized by law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships." In *Alabama etc. R. R. Co. v. Williams*, 78 Miss. 209, 84 Am. St. Rep. 624, 28 South. 853, it was held: "A mother cannot maintain an action for damages caused by the wrongful killing of her bastard son," citing *Illinois etc. R. R. Co. v. Johnson*, 77 Miss. 727, 28 South. 753, where it was held that an illegitimate half-sister cannot maintain an action under a statute of Mississippi entitling a

sister or brother to sue for the homicide of a sister or brother. In further support of the proposition that the right of action for a negligent or wrongful homicide is purely a statutory one and in derogation of common law, and that therefore the statute giving the right must be strictly construed and the case brought clearly within its provisions to enable the plaintiff to recover, we select from a number of cases the following: *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, wherein it was held: "Under the civil damage act, giving an action to one 'dependent' on the deceased, a plaintiff claiming to be his ¹⁷⁸ widow must show a lawful marriage, and one claiming to be his child must show his legitimacy." Rowell, J., said: "It is true, as contended, that the language of the statute is broad, 'in any manner dependent'; but after all we think it should be construed to mean a legal dependency only, the same as though it read, 'in any manner legally dependent.'" *Dickinson v. Northeastern Ry. Co.*, 2 Hurl. & C. 753, was approvingly cited. *Thornburg v. American Strawboard Co.*, 141 Ind. 453, 50 Am. St. Rep. 334, 40 N. E. 1062, wherein it was held that a statute giving a father a right of action for the homicide of his child confers no right upon one who marries the mother of a bastard child, and receives the child into his home as a member of his family, to sue for the death of the child. *McDonald v. Pittsburg Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447, in which it was held a bastard is not a child within the meaning of the statute of Indiana providing that a father may maintain an action for the death of a child. It appeared in that case that the plaintiff, when the child for whose death the action was brought was six months old, received him from his mother and relieved her of his care and custody, and acknowledged him as his own son, and afterward discharged every duty as a parent toward him, and received from him all the services, obedience, and respect due from a legitimate son, and that his mother abandoned him and was dead, and that the deceased had no guardian or next of kin. The plaintiff's action was dismissed on demurrer. *Citizens' St. Ry. Co. v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319, 53 N. E. 1092, in which it was held: "The right of a father or mother to recover damages for the wrongful killing of a child is statutory, and such an action cannot be maintained by a woman, where she is not the mother and has not legally adopted the child, although it was given to her in infancy, and she had ever since maintained and treated it as her own." *Western Union Tel. Co. v. McGill*, 57 Fed. 699,

where it was held, under a statute of Kansas, giving a right of action for death by wrongful act, and providing that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, that a widower could not recover for the wrongful death of his wife, who left children living, because he was not one of the beneficiaries of the statute, although under the Kansas statute of descent and distribution of estates a husband who survives his wife is entitled to a share of her personal estate. In the opinion, Sanborn, J., referring to the statutes giving a right ¹⁷⁴ of action for the negligent killing of another, said: "Under these statutes the following rules have been established without dissent among the authorities: The action under them is entirely the creature of the statute. If the right to maintain it and to recover the damages allowed in it in any case is not expressly given by these statutes, the judgment rendered cannot stand. Where such a statute giving a new right of action for damages specifies the person or class of persons for whose exclusive benefit the damages are to be recovered, no damages to any other person or class of persons can be allowed in the action based on the statute." In 1 Shearman and Redfield on the Law of Negligence, section 136, it is said: "Where, as in England, Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Louisiana, Georgia, Alabama, Missouri and Kansas, and other states, the statute [giving a right of action for homicide] specifies the 'child' of the deceased, an illegitimate child is not within the description."

There are, however, authorities of a different tenor. In *Muhl v. Michigan Southern R. Co.*, 10 Ohio St. 272, the headnote is: "In an action by the administrator of a woman killed by the carelessness of the servants of a railroad company in running its locomotive, the petition alleging and the proof showing the deceased to have left a son as her sole surviving heir—held: 1. That it is error to order a nonsuit on the ground that such child is illegitimate; 2. That the fact of such child's legitimacy or illegitimacy can in no respect affect the right of the action in his behalf." It appears that the suit was based upon a statute of Ohio, which provided that the action for a homicide should be brought by the personal representative of the deceased, and that the recovery should be distributed to the "Widow and next of kin, in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate." The deceased left a lawful sister and an illegitimate son. The trial court granted a nonsuit, because the child alleged in the petition to

be next of kin was a bastard. This ruling was reversed by the supreme court, upon the ground that the action was properly brought in the name of the personal representative of the deceased, and that the question whether the child or sister should be regarded as the next of kin did not in any way affect the cause of action, for the reason that the right to sue existed in favor of the administrator in either case. It is true, ¹⁷⁵ the court added: "But it is quite evident that the nearness or remoteness of kin on the part of the son of the deceased mother neither in fact nor by any canon of descent under the statute depended at all upon the circumstance of his being born within or without lawful wedlock." In view of the ruling made, this remark seems merely obiter. In *Security Title Co. v. West Chicago Ry. Co.*, 91 Ill. App. 332, it was held: "1. It was the intention of the legislature, by section 2 of the act of 1872 (Laws 1872, p. 353), . . . to remove the common-law disability of illegitimate children; 2. Under the statute requiring compensation for causing death by wrongful act, neglect or default, an action can be maintained for the benefit of the mother of an illegitimate child, as the next of kin of such child." The Illinois statute seems to be the same as the Ohio statute just referred to, and provides that the recovery "shall be for the exclusive benefit of the widow and next of kin," etc. As the mother of an illegitimate child could inherit from it under the law of Illinois, the court held that she was included within the term "next of kin" of such child. In *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, it was held: "Under the provisions of section 4425 of the Revised Statutes of 1889, giving the father and mother the right to join in an action for damages for the wrongful death of their unmarried minor child, and, in case of the death of either parent, that such suit may be brought by the survivor, the mother of a deceased illegitimate minor child may in such case sue alone, and the reputed father need not and should not be made a party." In delivering the opinion, Black, P. J., said: "The harsh rules of the common law have been modified by express statute in this state, so that the mother is declared the natural guardian of her illegitimate child: Rev. Stats. 1889, sec. 5279. And section 4473 declares: 'Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child or children in like manner as if they had been lawfully begotten of her.'" It may be stated that the plaintiff in this case finally brought his action against the same defendant

in the circuit court S. D. Ohio, W. D., and while the case was dismissed upon the ground that the statute upon which it was based was penal and, for that reason, could be enforced only within the sovereignty of its creation, yet Sage, J., said, as the matter had been fully argued before him, he would express his opinion as to whether ¹⁷⁶ the plaintiff had any standing in court. His opinion was that the statute extended only to the cases of the natural born legitimate children, and no action could be maintained by a mother for the death of her bastard child: *Marshall v. Wabash R. R. Co.*, 46 Fed. 269.

In this state, the mother of a bastard child is entitled to its possession, unless it is legitimated by the father, and, being the only recognized parent, may exercise all the paternal power: Civ. Code, sec. 2509. "Bastards have no inheritable blood, except that given to them by express law. They may inherit from their mother, and from each other, children of the same mother, in the same manner as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers, and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent": Civ. Code, sec. 2510. While it is evidently true that the status of bastards under our law is greatly superior to what it was under the common law, yet it cannot be said that they have been legitimated, at least for all purposes, and placed upon the same footing in all respects as children born in lawful wedlock; and, in view of the decisions of this court, above cited, to the effect that the statute giving a right of action for a homicide should be strictly construed, and that the word "child," used in a statute, *prima facie*, means a legitimate child, we are constrained to hold that the mother of an illegitimate child has no right of action for his wrongful or negligent homicide. The statute provides that: "A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." There are no words in the statute qualifying the word "child" in any particular, nor is there anything in the context which would authorize a conclusion that the legislature intended to use the word in any broader sense than is usually given it in statutes, but, on the contrary, the context plainly indicates, to

our mind, that the child in legislative contemplation was the child of a lawful marriage, whose mother, or, if no mother, whose father, might recover for his homicide.

Judgment affirmed. By five justices.

¹⁷⁷ CANDLER, J. I concur in the judgment rendered in this case, because of the previous rulings of this court, which seem to be binding upon us. If it were an original question, I would never agree to a judgment which holds that the doubly unfortunate mother of a child whose sole parent she is and upon whom she is dependent—this dependence probably due to the fact of its miserable birth—cannot recover for its homicide, although our lawmakers have declared that “a mother may recover for the homicide of a child upon whom she is dependent, or who contributes to her support.”

The Parent of an Illegitimate Child cannot recover, it has been held, for its death: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 674. The word “children” in a statute does not include illegitimates: *Alabama etc. Ry. Co. v. Williams*, 78 Miss. 209, 84 Am. St. Rep. 624, 28 South. 853. See, too, *Lavinge v. Ligue Des Patriots*, 178 Mass. 25, 86 Am. St. Rep. 460, 59 N. E. 674; note to *Thomas v. Thomas*, 73 Am. St. Rep. 415, 416.

SMITH v. STATE.

[117 Ga. 320, 43 S. E. 736.]

ROBBERY—Snatching a Purse from the Hand.—If one, with an intent to steal, suddenly snatches a purse secured by a chain around the owner's finger, breaking the chain and injuring the finger, the offense is robbery, and not larceny from the person. (p. 168.)

Indictment for robbery. The only witness gave the following material testimony: “I had my pocket-book fastened around my finger, holding it in that way, . . . and that lady there was next to me. . . . I had been down town on a shopping tour, and at the corner of Church and Fairlie streets. . . . she called me to look out, and as she did he [the accused] grabbed the purse and broke the clasp. He jerked it once. He jerked it hard, and it came off, and he got it. He broke the chain, for I had the chain around this finger, and he jerked it so hard he hurt my finger, and liked to have broken it. He got it so quick I did not know what was going on. I must have had a pretty tight grip on it, because I had it that way, and the chain was

broken, and he broke the chain. He must have used force when he grabbed it, the way I held it. I did not see him when he first grabbed me, but I saw him when he got it. I did not make any resistance, because I could not. I would, if I had seen him do it. The broken part of the chain was not left in my possession. He got the whole thing."

Frank R. Walker, for the plaintiff in error.

C. D. Hill, solicitor general, for the state.

⁶²¹ LAMAR, J. The defendant offered to plead guilty of the offense of larceny from the person, contending that, under the decisions of this court in *Fannin v. State*, 66 Ga. 167, and *Spencer v. State*, 106 Ga. 692, 32 S. E. 849, he could not properly be convicted of robbery. A comparison of these two cases with the common-law authorities and the Penal Code may be instructive, as the question presented by this record is one of constant recurrence. In the *Fannin* case it appeared "that the defendant slipped his hand into a lady's outside pocket and furtively took therefrom a purse of money. Before he got the purse entirely cut, she felt the hand and tried to seize it, but the thief had succeeded and the purse was gone. In extracting hand and purse, the pocket was torn, and when the lady turned she saw the thief looking unconcernedly at the houses on Whitehall street. She rushed upon him and caught him by the coat, which, in his struggle to escape, was torn, and left in her possession." It was there held that "the criminal deed was consummated when the purse was taken from the lady." The fact that the pocket was torn in the effort to get the furtive hand out was not sufficient to show such open force and violence as to make the crime robbery. The attempt and intent were private; his purpose was to take the purse privately and without her knowledge. The pocket was torn in the effort to escape, rather than as a means of effecting the crime. In the *Spencer* case a lady was holding her purse loosely, when her attention was diverted by the thief, who suddenly snatched the purse from her hand, without intimidation, and without resistance on her part or injury of any sort to her person. According to *Jones v. Commonwealth*, 23 Ky. Law Rep. 2081, 66 S. W. 633, even this was robbery. Robbery is defined in our Penal Code, section 151, as "the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation, without the consent of the owner." And "any sort of secret,

sudden, or wrongful taking from the person with the ~~and~~ intent to steal, without using intimidation or open force and violence, shall be" larceny from the person, "though some small force be used by the thief to possess himself of the property; provided, there be no resistance by the owner, or injury to his person, and all the circumstances of the case show that the thing was taken not so much against as without the consent of the owner": Pen. Code, sec. 177. Where a purse is held in the hand ever so lightly, some force must be exerted in order to snatch it from the owner, and some force must be used in order to withdraw a purse from the pocket; and it is this slight force that is referred to in the Penal Code, section 177. Anything beyond this slight and necessary exertion puts the offense in the domain of robbery. If the article is attached to the person or to the clothes so as to create resistance, and in spite thereof the article is taken, the element of force is present, and the offense of robbery is committed, if the other facts concur.

A brief review of the leading cases from other jurisdictions where the common law has been applied may serve to illustrate the meaning of force and violence as an element of robbery. In *Rex v. Lapier*, discussed in 2 East P. C. 557 (1 Leach C. C. 320), the force and violence were held to be sufficient to constitute the crime of robbery, where an earring was snatched from the ear of a lady so that it bled. In *Rex v. Moore*, 1 Leach C. C. 335, "to snatch a diamond pin from the headdress of a lady with such force as to remove it, with part of the hair, from the place in which it was fixed," was held to be "a sufficient violence to constitute robbery." *Rex v. Mason*, 1 Leach C. C. 418, was a case where the accused "laid violent hold of the seals and chain of the prosecutor's gold watch, and succeeded in pulling the watch out of his fob. The watch was fastened by a steel chain, which went around his neck, and which prevented the prisoner from immediately taking the watch; but by pulling and two or three jerks he broke the steel chain, and then made off with the watch." It was there ruled that "snatching an article from a man will constitute robbery, if it is so attached to his person or clothes as to afford resistance"; that while there was no injury to the person, as in *Lapier's* case, yet, as force was necessary to separate from the person the thing stolen, it was robbery. It appeared in *State v. Broderick*, 59 Mo. 318, that defendant, coming unexpectedly upon the prosecutor, ~~and~~ snatched his watch chain with such violence as to tear it away from the button-hole." The force and violence used were held

sufficient to characterize the crime as robbery. So in *State v. McCune*, 5 R. I. 1, 70 Am. Dec. 176, where the prisoner, while walking in the street by night, with a stranger, for the pretended purpose of guiding him to a livery-stable, suddenly seized the watch of the stranger, which was in his pocket, with violence enough to break a silk ribbon watch-guard, half an inch wide, about his neck, exclaiming, "I will have your watch," it was held to be robbery, though the person robbed could not swear that he feared anything except the loss of his watch. For a very full treatment of the subject, see *Jones v. Commonwealth*, 23 Ky. Law Rep. 2081, 66 S. W. 633, 57 L. R. A. 432, and note. In the present case the evidence shows that the article was so attached as to afford considerable resistance; the violence necessary to secure the purse was sufficient to break a steel chain, and inflicted injury on the person robbed. Here there was open force and violence, resistance by the owner, and injury to the person; so that it could not have been merely larceny from the person, but was robbery. The verdict was right.

Judgment affirmed. By five justices.

The Offense of Robbery is not committed by the mere taking or snatching of property from the person of another. But if violence is done to the person at the time of the snatching, the offense may amount to robbery. For example, it is robbery to snatch a watch chain with such force as to tear it away from the watch and the button-hole, or to take a watch with sufficient force to break the chain by which it is fastened about the neck, or to remove a diamond pin from the head-dress of a lady with such violence as to take along a part of the hair: See the monographic note to *State v. McCune*, 70 Am. Dec. 184, 185. Consult, in this connection, *Jackson v. State*, 114 Ga. 826, 88 Am. St. Rep. 60, 40 S. E. 1001.

ARRINGTON BROTHERS & CO. v. FLEMING.

[117 Ga. 449, 43 S. E. 691.]

AGISTOR—Care and Diligence Required of.—An agistor is bound to exercise ordinary diligence for the safety of animals intrusted to his care; what constitutes such diligence is, in a given case, a question for the jury. (p. 170.)

AGISTOR—Duty to Fence Pasture Along River.—An agistor is bound to keep his pasture properly fenced; but this is a provision of the law looking to the prevention of the escape of the animals, and cannot be construed to require the erection of a fence along a navigable river, which is itself a natural inclosure. (p. 170.)

AGISTOR—Fences, Evidence that Others have not.—If an animal intrusted to an agistor is drowned in a river bounding the pasture, and along which he has no fence, evidence is admissible, in an action therefor, that it is the general custom of others in that locality not to erect fences on the side of their pastures next to the river. (p. 170.)

C. E. Dunbar, for the plaintiffs.

W. H. Barrett, for the defendant.

⁴⁴⁹ **CANDLER, J.** The plaintiffs in the court below entered into a verbal contract with the defendant, whereby the latter agreed to furnish pasturage for their mule; and, accordingly, the mule was placed in the defendant's pasture, which lay alongside the Savannah river. The river formed the boundary of the pasture, and there was no fence along the river-front. The plaintiff's mule lost its life by being drowned in the river—in what manner does not appear from the record. The plaintiffs sued for the value of the mule, alleging negligence on the part of the defendant in failing to ⁴⁵⁰ fence off the pasture from the river. The jury found for the defendant. The plaintiffs made a motion for a new trial, which was overruled, and they excepted.

"If a man takes in cattle to graze and depasture on his land, he is a bailee (this particular kind of bailment being technically termed an agistment), and the bailee takes the cattle in this case on an implied contract or undertaking that he will look after them with ordinary diligence—which means, with that degree of diligence which men in general exert in respect to their own concerns": Broom's Commentaries on the Common Law, 916. "In the absence of a special contract, an agistor is not an insurer. In caring for the animals in his charge, he is required to exercise only reasonable care and diligence, becoming liable for loss thereof or injury thereto only where there is

a want of such care on his part": 2 Cyclopaedia, 321. "An agistor is not, like an innkeeper or carrier, an insurer of the safety of the cattle intrusted to him, but he is bound to exercise ordinary and reasonable care, and if they are killed or injured through negligence on his part, he will be held responsible. He must exercise such care as a man of ordinary prudence would use under the same circumstances toward his own property: 2 Am. & Eng. Ency. of Law, 2d ed.

4. The foregoing quotations embody the general principles of law governing contracts of agistment, which are in no manner different from those applicable in cases of ordinary bailment for hire. It is true, as contended by counsel for the plaintiffs in error, that an agistor is bound to keep his pasture properly fenced, but this is a provision of law looking to the prevention of the escape of the pastured animals from the inclosure, and cannot be so construed as to require the erection of a fence along the bank of a navigable river, which is itself a natural inclosure. It is equally true that the agistor is bound to exercise ordinary diligence to prevent the cattle intrusted to him from going into dangerous places, but what would be required by ordinary diligence as a preventive measure in a given case is a question solely for the determination of the jury.

The motion for a new trial complains that the court erred in admitting, over the objection of counsel for the plaintiffs, evidence to the effect that it was the general custom of those owning pastures along the Savannah river in this locality not to erect fences on the side next the river. As we have already pointed out, the diligence ⁴⁵¹ required of the defendant was that of an ordinary prudent man under the same circumstances. Clearly, then, as going to show that what was done by the defendant in this case was not negligent, it was competent to prove that the same thing was done by others in the same situation who were, presumably, ordinarily prudent men.

The motion also contains a ground which complains of several detached portions of the charge of the court below, some of which, at least, contained propositions of law correct in the abstract. Under the ruling of this court in the case of *Anderson v. Southern Ry. Co.*, 107 Ga. 501, 33 S. E. 644, this is not a good ground for a new trial. The requests to charge, not being in accordance with the principles here laid down, were properly refused; and there is nothing in the contention that the language of the court which is quoted in the motion amounted to an expression of opinion as to what had been

proved. There was abundant evidence to support the finding of the jury, and it does not appear that the court erred in overruling the motion for a new trial.

Judgment affirmed. By five justices.

Agistors are bound to exercise ordinary care and diligence, but they are not insurers of the safety of the animals intrusted to their care: *Union Stockyard etc. Co. v. Mallory etc. Co.*, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888; *Rey v. Toney*, 24 Mo. 600, 69 Am. Dec. 444; *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112. Whether or not an agistor has used reasonable care and diligence is a question for the jury: *Halty v. Markel*, 44 Ill. 225, 92 Am. Dec. 182.

DAVIS & CO. v. MORGAN.

[117 Ga. 504, 43 S. E. 732.]

CONTRACT—Past Consideration.—A Past Transaction, the obligation of which has been fully satisfied, will not sustain a new promise. (p. 172.)

MASTER AND SERVANT—Contract to Increase Salary.—If a contract of employment is made at a stipulated monthly salary for one year, an agreement during the term to pay more, unsupported by any change in the hours, character of the work, or other consideration, is void. (pp. 172, 173.)

CONTRACT—Moral Obligation.—Courts cannot Enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a consideration. (p. 174.)

Osborne & Lawrence, for the plaintiff in error.

Gignilliat & Stubbs, for the defendant in error.

504 LAMAR, J. Davis & Co. employed Morgan for one year at forty dollars per month. After the contract had been in force for some time, Morgan received an offer of sixty-five dollars per month from a company in Florida, and mentioned the fact to Davis, saying that, of course, he would not go without consent. Davis insists that he then said, if Morgan would stay out the balance of the term and work satisfactorily **505** he would give him one hundred and twenty dollars at the end of the year. Morgan says that Davis stated, "I will add ten dollars a month from the time you began, and owe you one hundred and twenty dollars when your time is up." Davis & Co. discharged Morgan two or three weeks before the end of the term,

because the latter had gone to Florida for several days without their consent. Morgan insists that he told Davis that he was going, and that Davis made no objection. He claimed that he was discharged without proper cause, and brought suit for the extra compensation promised. The jury found a verdict in his favor; and the court having refused to grant a new trial, Davis & Co. excepted.

If the promise contemplated that Davis & Co. were to pay Morgan ten dollars per month for that part of the year which had already passed, and as to which there had been a settlement, it was manifestly nudum pactum; for a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise: *Gay v. Mott*, 43 Ga. 254. And the result is practically the same whether Morgan or Davis was correct in the statement of the conversation. Both proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year. Morgan had agreed to work for twelve months at the price promised; and if, during the term, he had agreed to receive less, the employer would still have been liable to pay him the full forty dollars per month. On the other hand, the employer could not be forced to pay more than the contract price. He got no more services than he had already contracted to receive, and, according to an almost unbroken line of decisions, the agreement to give more than was due was a nudum pactum and void as having no consideration to support the promise. The case is something like that of *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886, where the landlord agreed to give the tenant certain property if he would pay his rent promptly, and it was held that such a promise was a gratuity and void as without consideration to support it. And see *Tatum v. Morgan*, 108 Ga. 336 (2), 33 S. E. 940; Civ. Code, sec. 3735. It is also within the principle of *Stilk v. Myrick*, 2 Camp. 317, where Lord Ellenborough held that an agreement to pay seamen extra for what they were bound by their articles to do was void. And so in *Bartlett v. Weyman*, 14 Johns. (N. Y.) 260, a similar ⁵⁰⁶ ruling was made in a case where a master agreed to give more wages if the seamen would not abandon the ship: See, also, *Ayers v. Chicago etc. Ry. Co.*, 52 Iowa, 478, 3 N. W. 522. There are cases holding that a new promise is binding where one of the parties to a contract refuses to perform, and to save a loss the innocent party agrees to pay more

than the original contract price if the other will perform as originally agreed: *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284. But even if that line of cases should not be disregarded as tending to encourage a breach of contract, they do not affect the rights of Morgan here, because he does not bring himself within their ruling. Had there been a rescission or formal cancellation (*Vanderbilt v. Schreyer*, 91 N. Y. 402) of the old contract by mutual consent, and if a new contract with new terms had been made; or if there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased wages, it would have been enforceable. But as it was, Morgan proved that Davis promised to pay more for the performance of the old contract than he had originally agreed. Such a promise was not binding.

It is argued that the moral obligation would support the promise here, and undoubtedly there are cases in which such consideration has been held to be sufficient; for example, that arising from the duty of a father to support his bastard child: *Hargrove v. Freeman*, 12 Ga. 342. At one time Lord Mansfield was quoted as having said that all promises deliberately made should be held binding; but Lord Denman, in *Eastwood v. Kenyon*, 11 Ad. & E. 438, attempted to show that this was either a misquotation, or that, if such a doctrine could have been deduced from whatever he said, the court had refused to follow it in *Littlefield v. Shee*, 2 Barn. & Adol. 811. The cases holding in conformity with Lord Mansfield's supposed statement, while set out in *Hargrove v. Freeman*, 12 Ga. 342, were not adopted as law, because the court finally held that the principle to be deduced from the general current of authorities is, that for a moral obligation to constitute a sufficient consideration to support an express promise, it must be founded upon an antecedent valuable consideration, though respectable authority can be adduced on the other side. In an agreement by one partner to pay the other for extra work (*Gray v. Hamil*, 82 Ga. 375, 10 S. E. 205), in the promise by a landlord to refund to tenants money paid by them ⁵⁰⁷ for worthless fertilizer (*Parrott v. Johnson*, 61 Ga. 475), and in the agreement by a brother to account to a sister for her interest as an heir at law in land which he had improperly induced the father to convey (*Brown v. Latham*, 92 Ga. 280, 18 S. E. 421), the court recognized that there was a moral obligation to support the promise, but in each of the cases there was something very close akin to a legal obli-

gation or to a trust. In *Pittman v. Elder*, 76 Ga. 371, it was shown that an agreement to pay a debt barred by the statute of limitations, or discharged in bankruptcy, was not supported by what was formally called a "moral obligation," but by the antecedent obligation, the new promise to pay amounting simply to a waiver of the statute, or of the discharge. The Civil Code, section 3658, defines a good consideration to be such as is founded on natural duty and affection, or "on a strong moral obligation." In the light of the authorities, however, the strong moral obligation here referred to seems to be one supported either by some antecedent legal obligation, though unenforceable at the time, or by some present equitable duty. The section, however, does not relate to the moral obligation which inheres in every promise: *Austell v. Humphries*, 99 Ga. 416, 27 S. E. 736. While all courts recognize the obligation arising from any undertaking, they are, from the necessity of the case, forced to hold that naked promises must depend for their performance solely upon the will of the promisor, and not upon the tribunals which are organized to perform the "duty of government to protect person and property," and in pursuance thereof to award money damages for breaches of contracts: Civ. Code, sec. 5699. But they cannot enforce promises binding on the conscience except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a consideration. When one receives a naked promise and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law. They are lightly made, dictated by generosity, courtesy, or impulse—often by ruinous prodigality. To enforce them by a judgment in favor of those who gave nothing therefor would ⁵⁰⁸ often bring such imperfect obligations into competition with the absolute duties to wife and children, or into competition with debts for property actually received, and make the law an instrument by which a man could be forced to be generous before he was just. Both under the civil and common law, courts were prohibited from enforcing contracts without consideration, and relegated the performance of such promises solely to those who made them.

Judgment reversed. By five justices.

A Promise Made to a Person to induce him to perform an act which he is already bound in law to perform is without consideration and not binding: *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271, 50 N. E. 769. And a subsequent agreement not forming any part of an original contract, nor supported by the original consideration thereof, nor by any new consideration, is void: *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030. Moral obligations as a consideration to support an express promise are discussed in the monographic note to *Ferguson v. Harris*, 39 Am. St. Rep. 735-746.

BURNETT & GOODMAN v. CENTRAL OF GEORGIA
RAILWAY COMPANY.

[117 Ga. 521, 43 S. E. 854.]

CORPORATION—Service of Garnishment on Agent.—An officer's return reciting that a summons of garnishment was served "personally on S. C. Hoge, agent in charge of the Central of Georgia Railway Company," does not show a service upon the corporation, but only upon Hoge in his individual capacity. (p. 176.)

F. Chambers & Son, for the plaintiffs.

J. E. Hall, R. D. Feagin, Hardeman, Davis, Turner & Jones and E. P. Johnston, for the defendant.

⁵²¹ COBB, J. A summons of garnishment was issued and served "personally upon S. C. Hoge, agent in charge of the office of the Central of Georgia Railway Company." Hoge filed an answer denying indebtedness. The court struck this answer, and entered a judgment by default against the railroad company, it not having filed any answer to the summons. The railroad company sued out a petition for certiorari, alleging that the judgment entered against it was unauthorized and void, and exception is taken to a judgment of the superior court sustaining the certiorari.

Civil Code, section 4710, is as follows: "Service of a summons of garnishment upon the agent in charge of the office or business of the corporation in the county or district at the time of service shall be sufficient."

To give the court jurisdiction of the corporation it is absolutely essential that the summons of garnishment shall be served upon it. It is within the power of the general assembly to prescribe how such service shall be perfected; and, under the provisions of the section quoted, service upon the corporation may be had by serving the summons upon the agent in charge of its

office or business. The corporation may be served by delivering the process to the individual who is its agent; but the entry of service should indicate with reasonable certainty that it was the corporation and not the individual who was intended to be served. The entry of service in the ⁵²² present case does not show a service upon the corporation, but only upon Hoge in his individual capacity; the words "agent in charge of the office" of the corporation serving merely to describe and identify the individual upon whom the service was made: See *State v. Salade*, 111 Ga. 701, 702, and cases cited. This rule should, if anything, be more strictly applied in cases of garnishments than in ordinary suits: See in this connection, *Clark v. Chapman*, 45 Ga. 488. The service was upon Hoge individually, and he properly answered the summons. The action of the court in striking the answer of Hoge and entering judgment by default against the railway company was erroneous, and the court properly sustained a certiorari sued out by it for the purpose of having the judgment set aside. If the officer's return had recited that he had served the summons of garnishment upon the Central of Georgia Railway Company, by handing the same personally to S. C. Hoge, who was the agent of the corporation and in charge of its office or business, this would have been sufficient. The return in *Third Nat. Bank v. McCullough*, 108 Ga. 249, 33 S. E. 848, was in this form. The question dealt with in the present case was not involved either in *Central R. R. Co. v. Smith*, 69 Ga. 268, or *Flournoy v. Rutledge*, 73 Ga. 735, or in *Mitchell v. Southwestern R. R. Co.*, 75 Ga. 398. In all three cases the process was treated as referring to the individual named in his capacity as agent of the corporation in question, and the question was whether, so treating it, it was sufficient. Besides, in the last case, additional service was had upon the president of the corporation, and it was held generally that the service was sufficient.

Judgment affirmed. By five justices.

An Affidavit of Service of a summons reciting that affiant "personally served the same upon J. H. Elledge, the managing agent of the above-named defendant corporation," such corporation being the sole defendant in the case, shows a service upon the corporation: *Keener v. Eagle Lake etc. Co.*, 110 Cal. 627, 43 Pac. 14. Said the court: "If Elledge had been a codefendant with the corporation, and the return of service had shown that only one copy of the summons had been delivered to him, there would be some reason for holding that it was a personal service upon him alone; but, as the corporation was the sole defendant, that reason does not exist."

EQUITABLE LOAN AND SECURITY COMPANY v. WARING.

[117 Ga. 599, 44 S. E. 520.]

CONTRACT Opposed to Public Policy.—The Power of Courts to declare a contract void for being in contravention of public policy is very delicate and undefined, and should be exercised only in cases free from doubt. (p. 190.)

CONTRACT—Supervision by Courts.—Courts should be extremely cautious in supervising private contracts, when the law-making power has not declared them unlawful. (p. 191.)

CONTRACT—Whether Fraudulent Because Impossible.—It is only in an extreme case that a court should hold a contract of such a character that its performance is impossible or improbable, and therefore that those who entered into it must have done so with a fraudulent intent. (p. 191.)

FORFEITURES—Interpretation and Enforcement of.—Forfeitures are not favored, and a contract, if ambiguous, will be so construed as to avoid them; but when it is clear that the parties have agreed to a forfeiture, a court of law or of equity will enforce it. (p. 192.)

FORFEITURES—When not Relieved Against.—The Time of Payment specified in a contract may be material, and by its terms a failure to pay within that time may involve an absolute forfeiture; and if it does, the forfeiture will not be relieved against even in a court of equity. (p. 192.)

FORFEITURES AND LAPSES—Business Dependent on.—The mere facts that the success of a business or scheme is dependent, to some extent, upon lapses and forfeitures, even many lapses, is not sufficient to render it illegal. (pp. 193, 194.)

CONTRACT—Construction in Favor of Legality.—It is not presumed that people intend to violate the law, and the language of their undertakings must be construed, if possible, so as to make the obligation one which the law recognizes as valid. (p. 196.)

CONTRACT—Construction by Party in Favor of Legality.—A construction in favor of the legality of a contract may be strengthened by the fact that one of the parties thereto has always placed that construction upon it. (p. 196.)

LOTTERY.—The Three Essential Ingredients of a lottery are consideration, prize, and chance; chance alone, or coupled with consideration, will not make a lottery. (pp. 195, 199.)

LOTTERY—Multiple Table.—Where Certificates of Investment are issued by a company, the fact that those to be called for redemption are determined by reference to a table of numbers arranged according to multiples of the figure 3, instead of in their numerical order, thereby making it possible in some cases for certificates to be redeemed before others of older date, does not make the scheme a lottery. (pp. 197, 198.)

LOTTERY—Chance and Prize.—When a Number of Persons are entitled in any event each to a given amount, though it may not be the same amount, and all cannot be paid at one time, the deter-

mination by lot, or chance, or drawing of what portion of that number shall be paid at different times, does not give to the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by lot, drawing, or chance, that the elements of a lottery are present. (p. 199.)

LOTTERY—Investment Certificates—Absence of Prize.—A scheme for the issuance and redemption of investment certificates or bonds, which involves the elements of consideration and chance, but not the element of prize, is not a lottery. (pp. 185, 199, 202.)

CORPORATIONS.—If any Statement in the Literature of a corporation is at variance with the contract which it finally makes with the holder of its certificates, what is stated in the certificate must control until the contract is reformed or rescinded. (p. 203.)

APPEAL—Right to Hearing by Full Court.—Even if, under any circumstances, a litigant has a right to ask that his case be heard before a full bench of judges in the supreme court, the application must be made before the case is heard. It is too late to urge the right as a ground for a rehearing. (p. 210.)

JOINT TENANCY with Survivorship.—In Georgia the mere creation of an estate in two or more persons never draws to it survivorship as an incident, and the presumption is that survivorship is not intended; but if it is provided for by express terms or necessary implication, the law allows it to exist. (p. 212.)

Hoke Smith, H. C. Peebles, Candler & Thompson, Rosser & Brandon, H. E. W. Palmer and E. W. Butler, for the plaintiffs in error.

John L. Hopkins & Sons, Brown & Randolph, and G. T. and J. F. Cann, for the defendant in error.

642 **COBB, J.** This case is here upon a bill of exceptions of the Equitable Loan and Security Company, assigning error upon an order of the judge of the superior court of the Atlanta circuit, placing its entire assets in the hands of a receiver for administration. The reasons for appointing the receiver were, that the scheme of the company, if not a lottery, was, to say the least of it, in the nature of a lottery, and was therefore, illegal; that the contracts evidenced by its certificates were impossible of performance by legal methods; and that such contracts were contrary to public policy. The court did not base its judgment upon the ground that the officers of the company had been guilty of malfeasance, misfeasance, or breach of trust. The court found that the officers of the company had not been guilty of any personal dishonesty or speculation in dealing with the assets of the company, but held that the scheme was illegal. The court also found that, if the scheme of the company was legal and its

contracts valid, any deception which may have been practiced upon any of the certificate holders was not of such a character as to require the appointment of a receiver; that while such certificate holders might have their remedy by a rescission of the contract, there was nothing in the evidence authorizing the appointment of a receiver on this ground. The court did not appoint a receiver on the ground of the insolvency of the company, and did not make any finding in terms on the question as to its solvency ⁶⁴³ or insolvency. The court also found that the company, under its charter, was authorized to make investments in real estate, and that the certificate holders had no right to complain that the charter had been so amended as to authorize the company to engage in this business. It will thus be seen that the first question to be determined is whether the scheme of the company was illegal. In order to fairly pass upon the question of the legality of the scheme, it is necessary to take into consideration the origin and history of the company. The original charter of the company was granted on January 30, 1894, under an order of Fulton superior court. It authorized the company to carry on the business of dealing in stocks, bonds, notes, and securities of every description, with a right to negotiate loans, charge commissions, and loan money upon collaterals, mortgages, or other security. It is also authorized the company to issue investment bonds and certificates, to be paid for by the investor in monthly installments, or otherwise, the plan to be fully set forth in the certificates or bonds. The amount of the capital to be employed was fixed at two thousand five hundred dollars, with the privilege of increasing it to one hundred thousand dollars. By an amendment to the charter, granted March 26, 1896, the company was authorized to purchase, improve, lease, sell, and dispose of or use in any way it might see fit, property of any description, real or personal; to execute notes, bonds, and other obligations, and to secure the same by deed of trust, or other form of security, including the right to guarantee the payment of obligations of other persons, natural or artificial; to pursue the plan of national or other building and loan associations, should its directors see fit to adopt such plan of operation in whole or in part. This amendment to the charter was accepted by the company on March 31, 1896. Shortly after its incorporation, the company issued an investment certificate, which is styled "Class 'A.'" The following is a copy of one of such certificates:

"The Equitable Loan and Security Company, of Atlanta, Georgia, promises to pay to ——— of ——— or order, at its home office in Atlanta, Ga., five hundred and five dollars and fifty-four cents (\$505.54), upon the following express terms and conditions:

"1st. That there shall be paid by the holder to the maker hereof, at its home office in Atlanta, Ga., without any other or further notice, an installment of one dollar and twenty-five cents (\$1.25) on the fifth day of each and every succeeding month hereafter until ~~644~~ one hundred and thirty installments shall have been thus paid, time being of the essence of this contract.

"2nd. That the holder hereof shall surrender for cancellation this certificate, whenever the same shall be called, upon the payment to him of its then redemption value; the maker reserving the right to call and pay the same before maturity; under the following rules and regulations. Certificates paid before maturity shall be paid in the following order, to wit: The first paid shall be number one, the second paid shall be number three, the third paid shall be number nine, the fourth paid shall be number two, the fifth paid shall be number six, the sixth paid shall be number eighteen, the seventh paid shall be number twenty-seven, the eighth paid shall be number four, the ninth paid shall be number twelve, the tenth paid shall be number thirty-six, and so on, according to the table which is printed on the back hereof, and which table is hereby referred to and made a part of this contract.

"3rd. That the redemption value of this certificate, if paid prior to its maturity, shall be fifteen dollars if paid one month after date, eighteen and 5-100 dollars if paid two months after date, twenty-one and 11-100 dollars if paid three months after date, twenty-four and 18-100 dollars if paid four months after date, twenty-seven and 26-100 dollars if paid five months after date, and thirty and 35-100 dollars if paid six months after date, and so on, the redemption value increasing three dollars with each installment paid, besides interest at the rate of four per cent. per annum on the redemption value of said certificate for the month next preceding the date of redemption hereof.

"4th. That of each and every installment paid as aforesaid the maker hereof shall place twenty-five cents to a reserve fund, which shall be used and held for the protection of all live outstanding certificates issued by this company; and seventy-

five cents to a redemption fund, which may be used as follows: (a) For paying certificates issued by this company in the order and manner that they shall mature. (b) For paying off and retiring certificates prior to their maturity, according to the terms hereinbefore stated. (c) For paying the heirs, executors, or administrators of any deceased holder hereof the sum that installments paid by such deceased may have contributed to the redemption and reserve funds, provided said certificate is in full force at death of holder and satisfactory proof of ⁶⁴⁵ such death is furnished the maker hereof within sixty days after death occurs; and the remaining twenty-five cents, and all transfer fees, shall be used for the expenses of said Company.

"5th. That a failure to pay any one of said installments when due subjects the holder hereof to a fine of fifty cents, which, together with the omitted installment, must be paid by the fifth day of the next succeeding month; and if said installment and fine are not paid within the said time, then this certificate shall be null and void, and of no value, and the holder hereof forfeits all payments and fines; provided, however, that this company will reinstate said certificate at any time within three months after such forfeiture, upon the holder hereof first paying all dues hereon, together with fines assessed at the rate of fifty cents for each payment in default. If this certificate shall, according to the plan of redemption herein stated, become payable after it shall have been forfeited, and before its reinstatement, then it shall be entitled to payment the next month after its reinstatement. And provided further, that after sixty monthly installments shall have been paid in the manner herein provided, and all other stipulations herein shall have been fully complied with by the holder hereof, and such holder shall thereafter default in any subsequent installment, the maker agrees to issue to such defaulting holder a new certificate which shall bear the next unsold number, for an amount equal to the payments made on such defaulted certificate, less the amount deducted for expenses, which new certificate thus issued shall be non-assessable and shall bear interest at the rate of four per cent. per annum, and shall be payable in its regular order as per plan of redemption herein stated; provided application for such new certificate shall be made to the home office of the Company and the old or defaulted certificate surrendered within three months after such defaulted certificate shall be cancelled on the books of the Company.

"6th. That all receipts from fines shall be paid into the redemption fund.

"7th. That the contributions to the reserve and redemption funds may be loaned to the holders of certificates issued by this Company, upon terms and security to be accepted by the Board of Directors; provided that not more than one hundred dollars can be loaned on account of any one certificate, and no loan can be made for a longer time than five years.

"8th. That after the reserve fund shall have reached the sum of one hundred thousand dollars, the interest earnings therefrom may, at the option of the Board of Directors, of this Company, be applied to the redemption of certificates then in force issued by this Company. And when the reserve fund shall have reached the sum of two hundred thousand dollars, then fifty per cent., or any other portion of all the further current contributions thereto, may be applied to the redemption of certificates in force in like manner with the interest thereon, when the Board of Directors shall so authorize.

"9th. That no transfer of this certificate shall be valid or binding on the maker hereof until such transfer has been made in writing thereon, and the same duly recorded on the books of the Company at its home office; and for each transfer a fee of One Dollar must be made before a transfer will be made.

"10th. That each and every transferee of this certificate accepts it subject to all the stipulations herein.

"11th. That no statement made by anyone except as herein set forth shall be binding on this Company.

"12th. That no part of the Reserve, Redemption, or other fund shall ever be loaned to any Officer or Director of this Company.

"13th. That no part of the Reserve or Redemption fund shall be loaned, *except* (A) upon improved real estate within the incorporate limits of the city in which it is located, and then not in excess of 50 per cent. of its cash market value; (B) Upon Government, State, County, or City Bonds that have never defaulted the payment of interest; and this provision can never be changed except by the consent of every holder of live Certificates issued by this Company in Class "A."

"In Witness Whereof, this Company has caused this Certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary." (Dated and signed.)

The following appears upon the back of the certificate:

TABLE REFERRED TO IN THE BODY OF THIS CERTIFICATE.

READ FROM LEFT TO RIGHT.

Numerical Col.	No.	1st Multiple Col.	No.	2nd Multiple Col.	No.
Pay first	1	then	3	then	9
Then	2	then	6	then	18
				then	27
Then	4	then	12	then	36
Then	5	then	15	then	45
				then	54
Then	7	then	21	then	63
Then	8	then	24	then	72
				then	81
Then	10	then	30	then	90
Then	11	then	33	then	99
				then	108
Then	13	then	39	then	117
Then	14	then	42	then	126
				then	135
Then	16	then	48	then	144
Then	17	then	51	then	153
				then	162
Then	19	then	57	then	171
Then	20	then	60	then	180
				then	189
Then	22	then	66	then	198
Then	23	then	69	then	207
				then	216
Then	25	then	75	then	225
Then	26	then	78	then	234
				then	243
Then	28	then	84	then	252
Then	29	then	87	then	261
				then	270
Then	31	then	93	then	279
Then	32	then	96	then	288
				then	297
Then	34	then	102	then	306
Then	35	then	105	then	315
				then	324
Then	37	then	111	then	333
Then	38	then	114	then	342
				then	351
Then	40	then	120	then	360
Then	41	then	123	then	369
				then	378
Then	43	then	129	then	387
Then	44	then	132	then	396
				then	405
Then	46	then	138	then	414
Then	47	then	141	then	423
				then	432
Then	49	then	147	then	441
Then	50	then	150	then	450
				then	459
Then	52	then	156	then	468

Numeral	Col.	1st Multiple Col.	2nd Multiple Col.
	No.	No.	No.
Then	53	then 159	then 477
			then 486
Then	55	then 165	then 495
Then	56	then 168	then 504
			then 513
648 Then	58	then 174	then 522
Then	59	then 177	then 531
			then 540
Then	61	then 183	then 549
Then	62	then 189	then 558
			then 567
Then	64	then 192	then 576
Then	65	then 195	then 585
			then 594
Then	67	then 201	then 603
Then	68	then 204	then 612
			then 621
Then	70	then 210	then 630
Then	71	then 213	then 639
			then 648
Then	73	then 219	then 657
Then	74	then 222	then 666
			then 675
Then	76	then 228	then 684
Then	77	then 231	then 693
			then 702
Then	79	then 237	then 711
Then	80	then 240	then 720
			then 729
Then	82	then 246	then 738
Then	83	then 249	then 747
			then 756
Then	85	then 255	then 765
Then	86	then 258	then 774
			then 783
Then	88	then 264	then 792
Then	89	then 267	then 801
			then 810
Then	91	then 273	then 819
Then	92	then 276	then 828
			then 837
Then	94	then 282	then 846
Then	95	then 285	then 855
			then 864
Then	97	then 291	then 873
Then	98	then 294	then 882
			then 891
Then	100	then 300	then 900

AND SO ON.

A large number of these Class "A" certificates were issued. The assistant attorney general of the United States for the postoffice department having given an opinion that the scheme indicated in these certificates was a lottery, by an order of the postmaster general the mails were closed against the company,

and, under the usual rules of the department in such cases, all letters addressed to the company were stamped as fraudulent and returned to the writer. An appeal was made to the department to reverse this ruling, but the department adhered to the same, and the postmaster general refused to rescind the order closing the mails to the company. There were, at the time the present case was instituted, only seventy of these certificates outstanding, and the holder of only one of them ⁶⁴⁹ is a party to the present proceeding. It is not necessary to determine whether the scheme indicated in this class of certificates was legal. From the evidence it appears that the officers of the company, so far as they were able to do so, protected the holders of these certificates, notwithstanding their condemnation by the postoffice department, and that all the holders, except the number above referred to, have been settled with upon terms which were, so far as the present record discloses, entirely satisfactory to the holders, and that the company has in hand a fund derived entirely from receipts and investments from this class of certificates, which can and will be used, as far as practicable, in settlement with the holders of these certificates. The evidence further shows that the funds derived from this source have never been mingled with other funds of the company, nor have other funds been used in any way in the settlement or discharge of certificates of this class. We will, therefore, not pass upon the legality of the scheme indicated in this class of certificates, and will eliminate from the discussion anything in reference to this class of certificates, except so far as their history may throw light upon the legality of the schemes indicated in certificates subsequently issued. The judge did not appoint a receiver on account of the illegality of these certificates. The reason he gave for the appointment was that he thought subsequently issued certificates were illegal. If the receiver had been appointed solely on account of Class "A" certificates, the order of appointment should and would have been limited in its operation to the fund in the treasury of the company, which was set apart for the payment of these certificates. Whether there should be a receiver appointed for this fund alone has not been passed upon by the judge, and will not now be passed upon by us. Upon the refusal of the postmaster general to rescind the order closing the mails against it, the company promptly ceased to issue certificates of the class above referred to, and did all that was possible to do under the circumstances to protect those who had in good faith bought the certificates. The com-

pany then issued certificates known as "Class 'B,'" a form of which is as follows:

"The Equitable Loan and Security Company of Atlanta, Georgia, hereby promises to pay to the order of _____ of _____, at its home office in Atlanta, Ga., FIVE HUNDRED DOLLARS, subject to the following express terms and conditions:

650 "1st. That the holder has paid four dollars herefor, and agrees to pay to the maker hereof at its home office, without any other or further notice, an installment of one dollar and twenty-five cents on the fifth day of each and every succeeding month hereafter, until one hundred and sixty-eight installments shall have been thus paid, time being of the essence of this contract, then this certificate shall become due and payable for its full face value.

"2nd. That the holder hereof shall surrender for payment and cancellation this certificate whenever the same shall be called, before maturity, upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all installments paid hereon, with interest on said amount at the rate of eight per cent. per annum, and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent per annum.

"3rd. That, in order to prevent favoritism or partiality being shown by the company, certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

"4th. That of each and every installment paid as aforesaid the maker hereof shall place fifty per cent. and all net receipts from fines to a redemption fund, which may used: (a) For paying off certificates prior to their full maturity term, according to the terms above set forth. (b) For paying certificates in the order and manner that they shall mature at the end of the full term. (c) For paying to the legal representatives of any deceased holder hereof the full amount of the first payment, and all installments paid hereon, with interest at the rate of eight per cent. per annum, and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent per annum; provided, this certificate is in good standing, and legal and sufficient notice of such death is furnished the maker hereof within sixty days after death occurs, or fines will be enforced as provided for in

section 5th hereof; and provided further, that if the holder hereof at the date of this certificate was more than fifty years of age, that the said legal representatives of such deceased shall not have the right to surrender this certificate for payment upon conditions above set forth, and the maker hereof can not be required to pay the same ⁶⁵¹ under this section hereof, but will issue in lieu hereof a paid-up certificate for the amount of installments that have been paid hereon, with four per cent. per annum interest, according to the provision regulating paid-up certificates in section fifth hereof, or this certificate may be continued as though death had not occurred; and thirty per cent. to a reserve fund which shall be used and held for the protection of all live outstanding certificates; and the remaining twenty per cent. and all transfer fees shall be used for the expenses of the company.

“5th. That a failure to pay said installments when due subjects the holder hereof to a fine of fifty cents each month for each and every installment in arrears, and if any installment or fine shall remain unpaid for six months, then this certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments and fines made hereon. Provided, that, at any time after eighty-four monthly installments have been paid hereon, the holder may surrender this certificate, if it is in good standing, and receive for it a new, non-assessable, and non-forfeitable certificate for the amount of installments that have been paid hereon, with interest at the rate of four per cent. per annum, which new certificate shall bear the next unsold number, and shall bear interest at the rate of four per cent. per annum, and be payable on or before the expiration of the tontine period from the time it is then issued.

“6th. That the entire assets of this company shall at all times be liable for the full payment of all obligations incurred in its certificates.

“7th. That the funds of this company may be loaned to the holders of certificates, upon terms and security to be approved and accepted by the board of directors.

“8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this company.

“9th. That no transfer hereof shall be valid or binding on the maker until it has been approved by the directors and recorded on the books of the company at its home office, and a fee of one dollar paid for making such record. Each and

every transferee hereof accepts this certificate subject to all the stipulations herein.

"10th. That no officer or director of this company, or any member of his or their families can purchase or own this certificate.

"11th. That no statement made by anyone except as herein set forth shall be binding on this company.

652 "In witness whereof this company has caused this certificate to be executed in its name and behalf under its corporate seal by its president and secretary." (Dated and signed.)

The multiple table referred to in this certificate is the same as that which appears upon the back of certificates of Class "A." The scheme of the company as indicated in these certificates was approved by the assistant attorney general of the United States for the postoffice department, and from the time it began to issue these certificates the company had the same unrestricted right to the use of the mails as any person engaged in a lawful business. Whether the certificates of Class "A" were legal or illegal it is to be said to the credit of the company and its officers that they abandoned the use of the same as soon as the authorities of the postoffice department had declared them to be illegal and did not issue any other form of certificate until the same had been approved by the law officer of that department. These facts indicate that it was the intention of the officers of the company at all times to obey the law of the land and to heed the voice of its authorized officials.

Is the scheme of the company as indicated in certificates of Class "B" of such a character that it must be declared unlawful, violative of sound public policy, and calculated to defraud? Let us first look at the scheme as indicated by the certificate, independently of other evidence throwing light upon the character of the contract. The certificate is an obligation on the part of the company to pay to the holder the sum of five hundred dollars, subject to the terms and conditions named in the certificate. Is it reasonably probable that the scheme indicated by these certificates can be carried into execution? While it does not appear in terms in the certificate, the fact is, as admitted, that the four dollars paid by the certificate holder is allowed the agent obtaining the certificate as a fee, and that this sum does not go into the treasury of the company. Twenty-five cents of each monthly installment is set apart for expenses. It is therefore to be determined whether it is reasonably probable that the company can legitimately realize with the monthly

installments of one dollar, at the end of fourteen years, a sum sufficient to pay the holder of the certificate five hundred dollars. Of course, if the contract is considered as simply a contract to receive one hundred and sixty-eight dollars in monthly installments of one dollar and to pay the holder of the certificate eight per cent interest thereon, the contract is incapable of performance; for eight per cent upon ⁶⁵⁸ one hundred and sixty-eight dollars paid in monthly installments would not, of course, realize the sum of five hundred dollars. But that is not the contract embraced in the certificate, taken in the light of the purposes for which the company was organized. The contract is to take the money paid to it in monthly installments and improve it according to well-known legitimate business methods, and guarantee to the certificate holder that at the end of fourteen years the company will pay to him the sum of money named in the certificate, which the company considers by its guaranty as the legitimate earnings of the money of the certificate holder, turned over and over and over again during the period that it is in the hands of the company. If the company in the handling of this money were limited to investments of the money at eight per cent simple interest annually, then no person of ordinary intelligence would for a moment purchase one of these certificates; for it would be manifest, not only to a man of average intelligence, but to the man far below the average, that such a contract was an impossibility. The legitimate resources of the company under its charter, which may be called into exercise for the purpose of improving the funds belonging to its certificate holders, are far more numerous than loans upon simple interest at the rate of eight per cent per annum. The company is authorized to loan money at eight per cent, and may contract for the interest to be payable annually, semi-annually, quarterly, bi-monthly, monthly or in even shorter periods. Such transactions would be perfectly legitimate, and are not subject to the charge of being usurious.

But suppose it should be said that interest payable monthly or for shorter periods is unusual, and that it is improbable that the company would transact business upon this plan. The reply is that it is legal and is one of the legitimate resources of the company, and it cannot be said that it is impossible, or even improbable, that the company will realize funds from this source. Loans of money, with interest payable at short intervals of time, are not unusual in the business world. They are constantly made by banks and other moneyed institutions. In-

addition to this, the company has a right to purchase negotiable paper, and in the purchase is not restricted, under the law of this state, to discount at the rate of eight per cent; and the proceeds that in all probability can be derived from this source of income would aid very much in the improvement of the fund placed, under the contract, in the hands of the officers of ⁶⁵⁴ the company for improvement for the benefit of the certificate holder. The company is authorized to engage in the purchase of property, either real or personal, and experience has demonstrated that wise and prudent business men make handsome profits in a business of this character. Indeed, there is scarcely any limit to the possible profits to be derived from such investments wisely made. The company is also authorized to deal in stocks, bonds, etc., and to guarantee the payment of obligations of other persons, both natural and artificial. All of these methods of business are lawful, and, if wisely adhered to, are profitable, and this company has authority to engage in them. In addition to these, there are other resources of the company for the benefit of the persistent certificate holder who continues to the end. Under the terms of the certificate, if any member desires to discontinue payments of installments at the expiration of seven years, he may do so, taking a paid-up certificate bearing only four per cent interest; and the legal representatives of deceased members who were more than fifty years of age at the date their certificates were issued may take paid-up certificates of similar character. Another resource is redemption of certificates. Still another is fines; and lastly lapses or forfeitures for nonpayment of assessments during the first seven years. The company holds out to the world that it will take the money of others and improve it in these various ways and pay back at the end of fourteen years a guaranteed sum.

Let it be conceded for the moment that all of the sources of profit above referred to are legitimate and proper, can it be said as matter of law that the scheme of the company is so far beyond possibility or probability of performance that those who engage in it are engaged in a fraudulent scheme which should be branded as being contrary to a sound public policy? Have not legitimate financial institutions in the past taken the money of investors and improved it in such a way that the profits were far in excess of the profits intended to be realized under this contract? Are not sound financial institutions at this time engaged in lines of lawful and legitimate business where profits of this character are realized for investors who intrust their

money to them? It has been said that the "power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, ⁶⁵⁵ should be exercised only in cases free from doubt": *Richmond v. Railroad Co.*, 26 Iowa, 202. It will not do for courts to declare contracts void simply because they are apparently unwise or even foolish. The authority of the law-making power to interfere with the private right of contract has its limits, and certainly the courts should be extremely cautious in supervising private contracts, when the law-making power has not declared them to be unlawful. The possibility or the probability of one being able to perform many of the contracts known to the commercial world is dependent upon so many considerations that it is only in an extreme case that the court should hold that a given contract is of such a character that its performance is impossible or improbable and that those who entered into it must have done so with a fraudulent intent. Of course, it is the duty of the courts to put their stamp of disapproval upon all contracts which are fraudulent, and for this reason calculated to deceive the confiding and the credulous. But not all foolish contracts are fraudulent, and it is neither the duty nor within the power of the courts to relieve a person from a contract merely because it is in its terms unwise or even foolish. Taking the contract evidenced by the certificate under consideration, with all of the resources of the company which can be called into operation for the purpose of improving the funds intrusted to its care, we cannot say as matter of law that the contract is so unreasonable and incapable of performance as to be void because opposed to a sound public policy. The company may be able to comply with the contract. On the other hand, it may not. Contracts, although not exactly of a similar nature, but involving as much risk of loss have been complied with. On the other hand, contracts involving less risk of loss than is apparent in this one have not been complied with. The success of the scheme of this company depends largely upon the honesty, wisdom and business sagacity of its officers, and those who place their money in the hands of the company take the chances that are always incident to intrusting to another the handling and improvement of a sum of money.

In thus dealing with the question, we have assumed that the company had at its command all the sources of income above referred to. It will, of course, be conceded that those resources

which relate to the purchase and sale of property, the guaranteeing of obligations, and the loan of money at lawful rates of interest are perfectly ^{and} legitimate and proper; persons engaging in business of this character lay themselves subject to no penalty or criticism. It is said, though, that the company relied upon lapses, and that lapses are based upon forfeitures, and that forfeitures are abhorred, and that contracts which depend for their performance entirely upon forfeitures are contrary to law and opposed to sound public policy. Forfeitures are not favored; and where a contract is ambiguous, and is capable of being so construed as to provide for a forfeiture and so as not to so provide, the courts uniformly hold that they will so construe the contract as to avoid the forfeiture. But the law permits a man to make a contract which will result in a forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture. The time of payment specified in a contract may be material, and by its terms a failure to pay within that time may involve an absolute forfeiture; and if it does, this forfeiture will not be relieved against, even in a court of equity. Mr. Justice Bradley, in *New York Life Ins. Co. v. Statham*, 93 U. S. 30, 31, in referring to the forfeiture of an insurance policy for nonpayment of premiums, says: "Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated or redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business": See, also, *Klein v. Insurance Co.*, 104 U. S. 88. In *Union Investment Assn. v. Lutz*, 50 Ill. App. 176, it was held: "An investment

association which applies the principle of joint tenancy ⁶⁵⁷ to the investments by the subscribers, the survivorship depending upon default of the members, instead of death, is not prohibited by law; and neither is such an association prohibited because the theory on which profit is promised is that one-half or more of the subscribers will fail to keep up their dues, and whatever money is paid in by defaulting subscribers will inure to the benefit of those who do not default: See, also, 26 Am. & Eng. Ency. of Law, 1st ed., 61.

The mere fact that the business or scheme depends to some extent upon forfeitures or lapses will not be sufficient to render the entire scheme invalid. If the scheme is dependent largely upon lapses, and it is apparent that a sufficient number of lapses to effectuate it will probably not occur during the period provided for the maturity of the contract, the question would be altogether a different one. In such a case the scheme might be illegal. In *State v. Interstate etc. Investment Co.*, 64 Ohio St. 283, 83 Am. St. Rep. 754, 60 N. E. 220, it was held: "Contracts of investment security, debentures, or certificates, which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy, and unlawful." In the opinion Davis, J., said: "A scheme which can succeed only by lapses is manifestly a scheme which will enrich some at the expense of others who embark in the same enterprise. It holds out the inducement that those who may be strong enough to survive will find their profit in the weakness, misfortunes, and the discouragements which cause a larger number of their associates to fall by the way. Moreover, since the salvation of the company depends on these lapses, it necessarily tends to encourage and produce them. True enough, all of these certificates are nonforfeitable after thirty-six monthly payments, but that only signifies that a larger number must fail in the first three years, or that the whole scheme must fail; for the vice of the plan is not that some may fail, but that many must fail, in order that all continuing certificates shall mature": See, also, *Peltz v. Financial Union* (N. J.), 19 Atl. 668; *State v. New Orleans etc. Redemption Co.*, 51 La. Ann. 1827, 26 South. 586. If these authorities simply hold that where it is apparent that the scheme is so dependent upon lapses that it could not succeed without them, and where the number of lapses necessary to effectuate the scheme is beyond all reason and

would in all probability not occur, the ⁶⁵⁸ scheme would be fraudulent, we will not undertake to combat the proposition thus laid down. If, however, the holding goes to the extent that every scheme dependent upon lapses, even many lapses, is inherently fraudulent, we cannot recognize such a ruling as in the slightest degree sound. In a case where lapses are simply a part of the scheme, and it cannot be said with certainty they form even a large part of it, the court should not declare the contract invalid as being opposed to a sound public policy simply because the success of the scheme is in part dependent upon forfeitures and lapses. If this were the law, then not only would the business of life insurance in all of its branches be at an end, but many contracts in other lines of business would come under condemnation. If absolute forfeitures and lapses would not make the contract invalid, then, of course, partial forfeitures, such as result from the voluntary retirement of a member at the expiration of seven years, would not make the contract illegal. Nor would partial forfeiture resulting from the death of a member affect the legality of the contract. Considering, as a whole, the resources the company may resort to for the purpose of carrying out the contract, it cannot be said, as matter of law, that the contract is fraudulent, or violative of the law of the land, or contrary to a sound public policy. It may be that the contract is unwise; it may be that it is a contract attended with risk, even great risk. But these are all questions to be determined by the investor, and we know of no law which prohibits him from taking the risk of such a contract.

Our learned brother of the circuit bench held that the scheme was a lottery, or at least in the nature of a lottery. There are various definitions of a lottery, some of the broadest being as follows: "A scheme for distributing prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize; especially where such chances are allotted by sale of tickets": Standard Dictionary. "A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine, until the same has been accomplished": Bouvier's Law Dictionary. "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it": Anderson's Law Dictionary. "Any scheme for the disposal ⁶⁵⁹ or distribution of property by chance

among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a 'lottery,' or 'raffle,' or a 'gift enterprise,' or by whatever name the same may be known": Black's Law Dictionary. Lotteries and similar schemes are prohibited by the law of this state: Pen. Code, secs. 406, 407; Meyer v. State, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96. There are three essential ingredients in a lottery—consideration, prize, and chance. One of these ingredients is certainly present in the scheme now under review—that is, consideration. Are the other two present? If the element of prize exists at all, it is to be found in the second clause of the certificate, which is as follows: "That the holder hereof shall surrender for payment and cancellation this certificate whenever the same shall be called, before maturity, upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all installments paid hereon, with interest on said amount at the rate of eight per cent per annum, and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent per annum." If this clause of the contract can be properly construed to mean that the company is compelled, or even may call for redemption any certificates before they have earned eight per cent interest per annum on the full amount of the first payment and on all installments paid, then there is an element of prize in the contract. But can the clause of the contract be properly so construed? It provides that the holder of a certificate shall surrender it before maturity, whenever the same shall be called, upon payment to him of its then redemption value. This redemption value is then declared to be the full amount of the first payment and all installments paid on the certificate, with interest thereon at the rate of eight per cent per annum, and its proportionate share of profits earned in excess of eight per cent. The certificate cannot be called until it has a redemption value, and that redemption value is fixed at a sum not less than eight per cent; but it may be more than eight per cent, provided a greater sum than this has been earned. Does the contract mean other than that the company may call for redemption those certificates which have earned at least eight per ⁶⁶⁰ cent on the amount paid in? Is not this the real meaning of the clause?

Do not the words, "earned in excess of eight per cent," necessarily imply that there can be no call for redemption until at least eight per cent has been earned? This seems to us a proper and reasonable construction of the contract. But suppose the clause is ambiguous. It is familiar law that if a contract is of doubtful meaning, and one construction would make it legal and another illegal, the courts are bound to adopt that construction which will not impute to the parties an intention to disobey the law. It is not to be presumed that people intend to violate the law, and the language of their undertakings must be always construed, if possible, in such a way as to make the obligation one which the law would recognize as valid.

This view of the matter is strengthened when we consider that it is the construction which the company has always placed upon this clause in the contract. The evidence in the present case shows that the officers of the company have construed this clause of the contract to mean that there was not to be any redemption until the certificate had earned at least eight per cent on the amount paid in. The secretary of the company testified: "A certificate is not eligible for redemption until it has earned eight per cent at least. If a man has not been in but six months, his certificate has not a redemption value until that sum has been earned, starting always with the one dollar." "No certificate was redeemed until its pro rata part of the assets of the company equaled the full amount paid to the company on account of said certificate, with interest thereon at the rate of eight per cent for the average time." If under the contract no certificate can ever be called for redemption until it has earned at least eight per cent, then there is no element of prize in the contract. If the affairs of the company are in such condition that some of the certificates have earned at least eight per cent upon the amount paid in, then under the contract it is a question for the company to determine whether it is to the interest of the company to retire such certificates, either in whole or in part. The holders have all agreed to surrender their certificates whenever they are tendered this amount; and whenever the company is in a position where it can tender this amount, or more, it is simply a question as to what shall be the policy of the company—to retire a portion of such certificates at their then value, ⁶⁶¹ or to retain the entire fund to be used and improved for the benefit of the certificate holders. When the company determines that it is to the interest of all concerned that a portion of the certificates shall be redeemed, then the question arises as to how

many of such certificates shall be redeemed, and how shall it be determined which certificates shall be called for redemption. The holders of these certificates place their money with the company for the purpose of increase and profit, and each investor thus placing his money with the company does so upon express condition that whenever a point has been reached where his certificate has earned eight per cent or more, the company has the right to tender him the value of his certificate and compel him to surrender the same. It might be more to the interest of all the certificate holders to continue to the end, but by the very terms of the contract every certificate holder has agreed with the company that it may settle with him at the value of his certificate at any time after it has earned eight per cent. This being the contract of each certificate holder, and it being foreseen that it would not be wise in all instances to redeem every certificate that had a redemption value, some method had to be adopted by which it would be determined who should be entitled to have their certificates redeemed if redemption was desirable, or who should be compelled to surrender their certificates if redemption at that time was undesirable. The whole purpose of the company was to make money for its certificate holders. Under the contract it may come to a settlement with some of its certificate holders at any time when the assets of the company would authorize a settlement at a sum made up of at least the amount paid in and eight per cent interest thereon. When it should have this settlement was left to the discretion of the company. The number who should be entitled to such settlement at any given time was also left to the discretion of the company. The manner in which the number should be selected was not left to the discretion of the company, but was to be determined by reference to what is called the multiple table, a copy of which is set forth above. When the company has determined how many certificates shall be called, a reference to this multiple table and the books of the company showing the outstanding certificates will show exactly what are the numbers of those certificates which will then be called. It can be determined as absolutely what numbers are embraced in a given call ⁸⁶² under the multiple table as if the plan had been adopted to redeem the certificates in numerical order. Some plan had to be adopted for ascertaining what numbers should be called when it was not desired to call all certificates that had a redemption value. Any plan adopted would be purely arbitrary, and any plan adopted would have some element of chance in it, using that word in its

broad sense. If the plan had been to pay certificates in their numerical order, there would have been the same element of chance as there is under the plan actually pursued, because the time at which the certificates shall be called would be governed in each instance by the order in which the applications reach the secretary and numbers are placed upon the certificates.

But let it be conceded that there is an element of chance, the scheme is not a lottery, or in the nature of a lottery, unless there is also the element of prize. We can see no element of prize in the scheme whatever. Certificates are called for redemption and matured at their own value, without reference to the redemption value of other certificates. It may be that the redemption value of a certificate will be the same as that of another certificate of another date, or it may be that its redemption value will be smaller or greater. But the holder gets no prize in the sense that term is used in lottery law. Each holder receives a return of the money which he has paid in, together with what it has earned, and can be compelled to receive this at any time that the earnings are eight per cent or more. The company makes the contract to pay a certain amount at the end of fourteen years, if in the management of the business it sees proper to retain the money during that entire period. It reserves the right to settle with each holder before the end of that period, at any time after the earnings of the company are such that his certificate would have the redemption value fixed in the contract, and it reserves the right to determine whether at such a time it will pay him or pay another certificate holder whose certificate is ready for redemption, by a reference to the multiple table above referred to. It must be admitted that the plan of redemption by reference to the multiple table is unique, and may even be said to be "catchy," speaking colloquially; and was probably resorted to for the purpose of attracting attention. But it would never do for the courts to hold that unique and unusual methods make enterprises unlawful or contrary to public policy. After the ⁶⁶³ most careful investigation and anxious consideration of this matter, we are unable to see in this contract anything which partakes of the element of prize. It seems to us that the contract is one of investment, where the investor relies upon the honesty, probity, and business sagacity of those in charge of the affairs of the company, and intrusts his money to them with the expectation of receiving satisfactory and, it may be, large profits at the end of the period fixed in the contract, but at the same time expressly undertaking to

withdraw his money at any time the company is in a position to offer him, as earnings on that money, the minimum amount fixed as a redemption value of his certificate, and this, too, at a time when other certificate holders, whose certificates are of greater or less redemption value than his, or it may be exactly equal with his, are not compelled to retire. It is said, though, that under the operation of the multiple table a certificate might be called at a time when it had not earned the amount necessary to make the redemption value. The secretary of the company testified: "We have never reached a multiple when the certificate has not earned eight per cent interest on the original four dollars and the one dollar and twenty-five cents paid in." Under the contract as we construe it, the company would not have a right to call for redemption a certificate which had not earned its minimum redemption value; and as the company, by reference to its multiple table and the list of outstanding certificates, can tell, when it fixes the number of certificates to be called, exactly what will be the numbers embraced in the call, it is not to be presumed that the company will make a call that embraces a number which could not be lawfully redeemed. The evidence just referred to shows that so far in the operations of the company no certificate has been called which was not entitled to be redeemed under the contract as we have construed it.

To make a lottery, as above stated, three ingredients must be present—consideration, chance, and prize. We find in this contract certainly the element of consideration, possibly the element of chance, but under no circumstances the element of prize. Chance alone will not make a lottery; and chance, even when coupled with consideration alone, will not make a lottery. When a number of persons are entitled in any event each to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot or chance or drawing of what portion of ⁶⁶⁴ that number shall be paid at different times would not give to the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by lot, drawing, or chance that the elements of a lottery are present. Corporations issue bonds and reserve the right to call in for redemption a portion of the bonds before they are due. It is not unusual in such cases for the contract to stipulate that the numbers of bonds to be called shall be determined by lot or chance. Such a transaction as this has never been held to be a lottery, although there was the element of chance in regard to

to whose bonds should be called. It is not a lottery, because there is no element of prize. The value of the bond is not increased or diminished by the drawing. Each bond is paid its value at the time it is called—no more, no less; and the only question determined by lot is whether the bond of A shall be called instead of the bond of B, or the bond of one number in preference to the bond of another number. Many schemes and devices have been held to be lotteries. From the briefs of counsel we select the following as a portion of the many cases that might be found relating to this subject: *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96; *McLaughlin v. National etc. Inv. Co.*, 64 Fed. 908; *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409; *State v. Clark*, 33 N. H. 329, 66 Am. Dec. 723; *Thomas v. People*, 59 Ill. 160; *In re National Indemnity Co.*, 142 Pa. St. 450, 21 Atl. 879; *United States v. Politzer*, 59 Fed. 273; *Dunn v. People*, 40 Ill. 465; *Sykes v. Beadon*, L. R. 40 Ch. Div. 170; *McDonald v. United States*, 59 Fed. 563, 63 Fed. 427; *United States v. Fulkerson*, 74 Fed. 619; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *State v. Moren*, 48 Minn. 555, 51 N. W. 618; *Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559, 20 Atl. 184; *State v. Mercantile Assn.*, 45 Kan. 351, 23 Am. St. Rep. 721, 25 Pac. 984; *State v. Boneil*, 42 La. Ann. 1207, 8 South. 300; *Regina v. Harris*, 10 Cox C. C. 352; *United States v. Zeisler*, 30 Fed. 499; *United States v. Wallis*, 58 Fed. 942; *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668; *Commonwealth v. Thacher*, 97 Mass. 583, 93 Am. Dec. 125.

We do not think it would be desirable or profitable to discuss in detail the facts of these numerous cases that have been called to our attention. Many of them are merely cases relating to general principles in reference to the law of lottery, about which there is no dispute. Some of them relate to investment companies; but none of these are, in our judgment, either in their facts or in their ⁶⁸⁵ reasoning close enough to the present case to be followed by us, even if they were decisions which were binding upon us as authority. In those cases where the facts were at all similar to those of the present case, there were some facts which, in our opinion, materially distinguished the cases from that which we now have under consideration. There was a union in each case of chance, prize, and consideration, or the contract was of such a character that it was so largely dependent upon lapses as to make it fraudulent and void. If in the foregoing discussion we have been so fortunate as to have clearly

set forth what we understand to be the scheme of the contract involved in the present case, we feel perfectly safe in saying that a mere casual examination of the cases cited will be all that is necessary to differentiate every one of them from the one now under review, though it is not at all incumbent upon us to show that any distinction between the cases exists. The courts have in many cases made rulings which were intended to protect the public from being imposed upon by fraudulent devices in the form of investment companies, and it is proper that the strong arm of the courts should be used in cases where the scheme is fraudulent and calculated to deceive and defraud. But no case has been called to our attention where any court of last resort has ever held a contract like the one under consideration, understood as we think it should be understood, and as the entire scheme requires it to be understood, to be unlawful or incapable of enforcement.

It is not insisted, as we understand, that there is any infirmity in that clause of the certificate which provides that the legal representatives of a deceased certificate holder, who was not more than fifty years of age when the certificate was issued, shall be settled with by the payment of all amounts which have been paid in, with eight per cent interest thereon, and its share of earnings in excess of that amount; and if the deceased holder was more than fifty years of age when the certificate was issued, and his legal representatives do not desire to continue the certificate as though death had not occurred, they shall be settled with by the delivery of a paid-up certificate for the amounts paid in, bearing four per cent interest per annum. Nor was it claimed that there was any infirmity in that part of the contract which provided that one who had paid for eighty-four months should be entitled to a paid-up certificate for such amounts bearing four per cent interest per annum. It ~~seems~~ might be that under the contract the legal representative of a holder who was not more than fifty years old when the certificate was issued would receive the full amount paid in, with eight per cent interest thereon, at a time when this amount had not earned eight per cent; but as this payment would be due to him by the happening of the death of the certificate holder, which is an event coming in due course of nature, this would not make the scheme any more illegal than it would make every contract of life insurance fraudulent and void. Taking the contract as a whole, and viewing the same as it has been construed by the officers of the company, and in the light of the manner in which the affairs of the

company have been administered, we find nothing in the contract that would justify us in condemning the same as illegal.

It is said, though, that the company issued literature which was calculated to impress the public and those who invested in the company with the idea that the business carried on was the business of a lottery, and that this literature was misleading and did not set forth the character of the enterprise as now contended for by the company. We will set forth some of these extracts from the literature of the company. Certain circulars of the company sent to prospective investors contained the following statements:

"The Equitable Loan and Security Co. is an established financial institution, whose governing principles are security, profit earnings, and speedy returns to the investor.

"All certificates pay their holders their equitable ratio of profits, whether called for redemption the 12th, 24th, 36th, or any month after their issuance.

"Insurance companies kill the man and pay the policy; the Equitable Loan and Security Co. kills the policy and pays the man, thereby insuring a speedy return to living members.

"A thorough knowledge of our plan will also show that it is absolutely perfect in point of security, profit earnings, equity, and speedy returns to the investor.

"To guarantee our certificate holders the largest profits and quickest possible returns, no officer or director of this company, or any member of his or their families, can ever own or purchase certificates, thus preventing those who are familiar with the inside workings of the company from speculating on delinquent investors and realizing any profits at the expense of prompt and persistent holders.

667 "Twenty certificates purchased in the Equitable Loan and Security Company, if carried to maturity, will pay you Ten Thousand Dollars, yielding a clear profit of \$5,720.00.

"The chief element and most prominent feature in our plan is to call and pay certificates as rapidly as our business will permit at their value, which value shall always be the full amount of first payment and all installments paid on them, with 8% interest, and their proportionate share of all dividends, accumulations from fines, lapses (forfeitures), and interest earned in excess of 8% per annum. For the express purpose of calling certificates for payment as rapidly and as early as possible, a redemption fund has been created," etc.

These extracts from the literature of the company contain a few of the many alluring attractions which are held out to prospective certificate holders. They embrace, we believe, those which are principally relied on in the present case to show misrepresentation and fraud in reference to the character of the company's business. It must be admitted that these declarations in the literature of the company evince a hopeful and sanguine spirit on the part of the officers of the company, and it is evidently their desire to impress the public and possible investors with the same spirit. Is what is said in this literature anything more than an effort to call attention to the character and business of the company in an attractive, enticing, and fascinating way? Are not such methods usual in the commercial world with those who have something to sell? Are they not permissible when not false or fraudulent? When these statements are read and understood, there is really nothing inconsistent with the plan of the company as we have held it to be. But suppose we are wrong in this, and that what is said amounts to misrepresentation and fraudulent misrepresentation; so far as the present case is concerned, it will avail the defendants in error nothing; for the reason that the court has not placed its order appointing a receiver on any such ground. On the contrary, it has distinctly held that if the individual holders of certificates were induced to purchase them by the fraudulent representations of the selling agent, or of the officers of the company, it might be ground for a rescission of the contract, so far as they are concerned, but it would not necessitate the appointment of a receiver to take charge of the entire assets of the company, unless it were shown that a receiver for the entire assets was necessary for the protection of the ~~ess~~ rights of such persons; and that if the scheme of the company is legal and its contracts valid, if any deception was practiced upon the certificate holders it would not require the appointment of a receiver. So far as these misrepresentations may have been made by the agents of the company, it is not bound by them, if they were at all in conflict with what was stated in the certificate, because in the face of each certificate is a distinct stipulation that no statement made by anyone, except as therein set forth, shall be binding upon the company. This language is broad enough to apply even to statements made by the officials of the company. The contract relations between the certificate holder and the company are absolutely controlled by the certificate, as long as it stands as evidence of the contract.

Let it be conceded that the literature of the company which was sent out and authorized by it was calculated to impress upon those who read it that contracts of a nature not provided for in the certificate were intended, and that the applicants for certificates made their applications expecting to obtain certificates of a character indicated by the literature and different from those indicated by the certificates; when they received the certificates with the statement in them above referred to, and could see by a simple reading that the certificate was different from what was contained in the literature, they would be bound by the terms of the certificate after they became acquainted with what was contained therein, or a reasonable and sufficient time elapsed for them to acquaint themselves with its contents after the certificate had come into their possession. The certificate was the evidence of the contract. When it was delivered to the certificate holder, it was his duty to read it and ascertain what was the contract relation that existed between himself and the company; and if the literature of the company proposed a different contract, he could, within a reasonable time, have claimed a rescission and recovered back what he had paid, if the contract contained in the certificate was substantially and materially different from that proposed in the literature of the company. Certainly, he cannot come into court as a certificate holder, and claim rights under a contract, not only not contained in the certificate, but directly antagonistic to the statements made therein, after having received and treated the certificate as evidence of the contract between himself and the company. The plaintiffs do not ask ~~ooo~~ either a rescission or a reformation of the contract. They claim that they are holders of the certificates as issued, and as such only do they pray for relief, and the relief asked for is not of a nature which the contract contained in the certificate would authorize. It may be that they have been deceived and defrauded and wronged by the misrepresentations of agents, or even of the officers, contained in authorized literature of the company. If so, they should not come into a court of equity endeavoring to use their position as certificate holders to enforce a contract not contained in their certificates; but their appropriate remedy was in due time to have applied for rescission of the contract, and ask that the company be required to pay to them the sums which it and its agents had received from them as a result of the fraud which had been perpetrated upon them. Fraud on the part of the agents and officers of the company would be a sufficient ground upon

which to base an application for a rescission of the contract, but fraud of the worst type would not authorize a court of equity, in the absence of a prayer for a reformation of the contract, to decree that the certificates issued, providing a contract of one character, should, on account of the misrepresentations made at the time they were issued or applied for, be declared a contract of an entirely different character.

It appears from the evidence that a large part of certificates of Class "B" are outstanding, and that the company has ceased to issue certificates of this class. At the time this suit was filed the company was issuing certificates known as Class "C." A copy of one of such certificates is as follows:

"In consideration of the written application for this Certificate (a copy of which is on the back of this Certificate) and the statements and agreements therein contained, which are hereby made a part of this contract, the Equitable Loan and Security Company hereby promises to pay to the order of _____ of _____ at the Home Office of the Company, Five Hundred Dollars, subject to the following express terms and conditions:

"1st. That the holder hereof agrees to and shall surrender this Certificate for payment and cancellation whenever the same shall be called before maturity, upon the payment to him of its then redemption value, which value shall be the full amount of all installments paid hereon, with a guaranteed profit of Eight per cent. per ⁶⁷⁰ annum (which profit must be earned before this certificate shall be eligible for redemption) together with its proportionate share of all profits or accumulations arising from interest, fines and lapses in excess of Eight per cent. per annum.

"2nd. That of each and every installment paid hereon the maker hereof shall place fifty per cent. and all net receipts from fines to a redemption fund, which may be used: (1st.) For paying off Certificates prior to their full maturity according to the terms herein set forth; (2nd.) For paying Certificates in the order and manner that they shall mature at the end of the full term; (3rd.) For paying to the legal representatives of the deceased holder hereof the full amount of all installments paid hereon with a guaranteed profit of Eight per cent. per annum together with its proportionate share of all profits or accumulations arising from interest, fines and lapses in excess of Eight per cent. per annum, Provided, this Certificate is in good standing and legal and sufficient notice of such death is furnished and this Certificate satisfactorily released and surrendered to

the maker hereof within ninety days after death occurs; otherwise this Certificate cannot be so surrendered, and all conditions will be enforced as provided for in section fifth hereof; (4th.) For paying all licenses and taxes: Thirty per cent. to a reserve fund which shall be used and held for the protection of all live outstanding Certificates; and the remaining twenty per cent. and all transfer fees shall be used for the expenses of the Company and such other purposes as the Directors may approve.

"3rd. That the holder has paid One Dollar and Fifty cents herefor and agrees to pay to the maker hereof at its Home Office, without any other or further notice, an installment of One Dollar and fifty cents on the fifth day of each and every succeeding month hereafter, until One Hundred and Sixty-eight installments shall have been thus paid, time being of the essence of this contract; then this Certificate shall become due and payable within thirty days from the date of said last payment for its full face value of Five Hundred Dollars.

"4th. That in order to prevent favoritism or partiality being shown by the Company, Certificates paid before maturity shall be paid by numbers; and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

671 "5th. That a failure to pay said installments when due subjects the holder hereof to a fine of 15 cents per month for each month on every installment in arrears, and if any installment shall remain unpaid for six months, then this Certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments (including fines) made hereon; Provided, that at any time after eighty-four monthly installments have been paid hereon, the holder hereof may surrender this Certificate, if it is in good standing, and receive for it a new, non-assessable and non-forfeitable Certificate for the full amount of installments that have been paid hereon, with interest at the rate of 4 per cent. per annum, which new Certificate shall bear the next unsold number and shall bear interest at the rate of 4 per cent. per annum and be payable on or before the expiration of the tontine period, from the time it is then issued.

"6th. That no transfer hereof shall be valid or binding on the maker hereof until it has been approved hereon by the Secretary and recorded on the books of the Company at its Home Office, and a fee of One Dollar and Fifty cents paid for making such record. Each and every transferee hereof accepts this Cer-

tificate subject to all the stipulations herein. This Company shall have a prior lien upon this Certificate for any indebtedness due said Company by the owner hereof as shown by the books of this Company.

"7th. That no statement made by anyone except as herein set forth shall be binding on this Company.

"8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this Company.

"9th. That the funds of this Company may be loaned to the holders of Certificates, and otherwise invested, upon terms and security to be approved and accepted by the Board of Directors.

"10th. That no officer or director of this Company, or any member of his or their families, can purchase or own this Certificate.

"In Witness Whereof, this Company has caused this Certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary." (Dated and signed.)

The multiple table referred to in this certificate is the same as that set out above, except that at the bottom of the table appears the following: "If at any time any multiple number next in the regular order of redemption should not have to its credit a sufficient ⁶⁷² per cent. profit to permit of its redemption according to the terms of this certificate, payment may revert back to the lowest numeral and multiple numbers coming next in order, and on which the profit is sufficient to justify their redemption, and this process continued until the suspended multiple numbers shall have enough earned profit apportioned to their credit to render them eligible for redemption, according to their terms, when they may be called."

If the contracts contained in certificates of Class "B" are lawful, it follows necessarily that the contracts contained in certificates of Class "C" would be lawful. In fact it was practically conceded that the issue in this case depended upon the validity of certificates of Class "B." Upon the invalidity of these certificates the court based its order appointing a receiver, and we think it is evident that the judgment appointing a receiver of the entire assets of the company was not based upon the certificates of either Class "A" or Class "C." The court based its decision appointing a receiver solely upon the ground that the scheme of the company was unlawful, and not upon the ground that the company was not carrying out in good faith the scheme authorized by the charter and indicated by the contracts made with the certificate holders. We are constrained, for the rea-

sons above given, to disagree with our learned brother in reference to the legality of this scheme. We have set forth what we believe to be the true interpretation of the contract. If the company is not keeping within the limits of its charter powers, or if it is not managing the assets in the manner provided in its contracts with the certificate holders, of course they have their appropriate remedy to bring the company within the limits of its charter and the scheme as set forth in the certificates. Whether the company has exceeded its charter powers, or whether it has managed the assets of the company in any improper way, it is not incumbent upon us to determine at the present time. The finding of the judge to the contrary precludes any inquiry into the subject so far as the present case is concerned. In our opinion the judgment must be reversed on the ground that the court erred in its interpretation of the contract; and as upon this ground alone a receiver was appointed, the order appointing the receiver should be vacated and the assets of the company restored to the possession of the officers of the company, to be administered by them in accordance with the charter, the contracts, and the law of the land.

673 From the view we have taken of the case, it is unnecessary for us to investigate the question whether a court of equity would under any circumstances take charge of the assets of a lottery company at the instance of one who knowingly went into the unlawful scheme. On first impression, it would seem to us that the purchaser of a lottery ticket was in *pari delicto* with the seller; and if the scheme of the company was as the learned judge of the court below held, the holders of certificates would be in no better position than the purchasers of lottery tickets. Upon this question, however, we refrain from expressing any matured opinion. Certain it is, however, that if the scheme of the company was in the nature of a lottery, and a court would, at the instance of one who went into the scheme, take charge of the assets of the company, then every person who ever paid one cent into the company would be entitled to participate in the distribution of these assets, even though by reason of his default his certificate had been forfeited. The assets should not be administered for the benefit alone of certificate holders who are in. They obtain no rights under their certificates, because the contracts would be illegal. If they have any rights, they arise from the fact that they paid money into an unlawful enterprise, and the holders of certificates who have paid paid in and lapsed are just as much entitled to participate as those who have paid in

and have not lapsed. If a court of equity will take charge of these assets, in order to prevent them from being used for this unlawful business, these assets should be returned to the true owners of the fund, that is, the holders of certificates at the present time and all persons who have contributed to the fund at any time. One reason why it appears to us that it is not the province of a court of equity to soil its hands in distributing a fund of this character is, that after all persons who have ever contributed to the fund have been repaid the amount contributed, with lawful interest thereon, and even the costs of suit and of the receivership have been paid, there will probably be remaining a surplus in the hands of the court, and it would be necessary to determine to whom this surplus belonged. A court of equity would certainly not give this fund to the holders of the lottery tickets, as it were. If it did, it would encourage people to buy lottery tickets, and would be giving to those who bought the tickets a part of the profits of the illegal enterprise. If the fund remaining in the hands of the court were not ^{§74} given to the purchasers of the tickets, it would have to be divided among the operators of the illegal scheme; and it would certainly be an unusual spectacle for men who had been promoters of a lottery scheme, and who had had a fund raised by them taken from them by a court of equity, to wait around the doors of the court until the fund had been administered, to see how much a court of equity would return to them as the promoters of the scheme. At no time in the history of the court of chancery have persons in possession of a fund procured by unlawful means been known to wait around the doors of the court for the time to arrive when a portion of such a fund should be returned to them by the court, for the reason that the owner could not be found and the court must make some disposition of it. The doors of a court of equity are closed against such persons, and should never open to admit a fund which would have to be so administered that a time would arrive when the law-breaker, loitering at the doors of the court in anxious solicitude as to the time and terms of the final decree, must be sent for in order that the court may deliver to him a part of the fund remaining unadministered in its hands. The unadministered part of the fund in such cases cannot, consistently with any rule of law or equity, be paid to those who were enticed into the illegal scheme; and a court of equity has no right to confiscate even the property of a law-breaker; and at the end of litigation of the character indicated by the above reflections, the

only course open to the court would be to call in the transgressor of the law and deliver to him a fund which, according to the rules of law and equity, could not with propriety be delivered to anyone else. However, as said above, we do not decide this question. These are simply some reflections growing out of the possibilities that might result from an attempt by a court of equity to administer a fund which in its inception and growth is tainted and impure. It does now seem to us that the only court that should ever open its doors to him who would improve his fortune by methods not authorized by law is that court which has jurisdiction to punish offenders against the law. Of all courts, a court of equity should not be opened to the lawless, to settle controversies concerning their spoils. The lawless should neither be allowed to pass the threshold of such a court, nor permitted to linger around its portals in anticipation of a benefit to be derived from its decrees.

⁶⁷⁵ Having reached the conclusion that the individuals engaged in this enterprise are not subject to the criticism that they are the managers of a lottery or promoters of a scheme which is unlawful, we are saved the necessity at the present time of deciding what would have been the rights of these certificate holders if their contentions had been sound.

Judgment reversed.

Fish and Candler, JJ., concur.

Lumpkin, P. J., absent.

ON MOTION FOR REHEARING.

COBB, J. The application for a rehearing in this case is based upon numerous grounds. A rehearing is asked upon the ground that the case was heard by only five justices and the judgment rendered was concurred in by only three. It is now asked that the case be reheard before a full bench of six justices. These facts alone furnish no sufficient reason for a rehearing. Under the constitution and laws, three justices may render a judgment in any case heard before less than six justices. Even if under any circumstances a litigant has a right to ask that his case be heard before a full court of six justices, the application must be made before the case is heard. The fact that one or more of the justices is absent and the judgment is rendered by three justices only constitutes no ground for a rehearing at the instance of a party. While it does not appear in the official report of the case, still the records of this court disclose that

in the case of *Gilbert v. State*, 116 Ga. 819, 43 S. E. 47, which was heard by four justices and the judgment rendered by three, the fourth dissenting, an application for a rehearing upon the ground above referred to was refused.

It is further contended that a rehearing should be granted for the reason in that the opinion of the majority it is recognized that the ⁶⁷⁶ scheme is dependent to some extent upon the doctrine of survivorship; and that as joint tenancy with its incident of survivorship has been abolished in this state, the ruling is unsound to the extent referred to. It is true that the common-law doctrine of survivorship among joint tenants was abolished by the constitution of 1777: *Lowe v. Brooks*, 23 Ga. 325; *Carswell v. Schley*, 56 Ga. 101, 108. See, also, *Bryan v. Averett*, 21 Ga. 402, 68 Am. Dec. 464; *Harrison v. Harrison*, 105 Ga. 520, 70 Am. St. Rep. 60, 31 S. E. 455. The code declares: "Joint tenancy does not exist in this state, and all such estates under the English law will be held to be tenancies in common under this code": Civ. Code, sec. 3142. It follows, therefore, that wherever an instrument creates an estate which at common law would be held to be a joint tenancy, in this state the instrument would be held to take effect as to all its terms, except so far as it provided by implication for survivorship among the tenants, and such tenants would be held to occupy to each other, so far as this question is concerned, the relation of tenants in common. While the doctrine of survivorship as applied to joint tenancies has been distinctly abolished and does not exist in this state, there is no law of this state that we are aware of which prevents parties to a contract, or a testator in his will, from expressly providing that an interest in property shall be dependent upon survivorship. Of course, all presumptions are against such an intention; but where the contract or will provides, either in express terms or by necessary implication, that the doctrine of survivorship shall be recognized, we know of no reason why a provision in the contract or will dependent upon such doctrine may not become operative under the laws of this state. While this question seems not to have been distinctly passed upon by this court, there are numerous cases in which the doctrine of survivorship has been recognized as being operative. Among the cases on this subject, see *Riordan v. Holiday*, 8 Ga. 79; *Benton v. Patterson*, 8 Ga. 146; *Dunn v. Bryan*, 38 Ga. 154; *Hooper v. Howell*, 50 Ga. 165, 52 Ga. 316; *Parrott v. Edmondson*, 64 Ga. 332; *Olmstead v. Dunn*, 72 Ga. 850. At common law an estate in joint tenancy, with the incident of sur-

vivorship, was created in any case where lands or tenements were granted to two or more persons, to be held in fee simple, fee tail, for life, for years, or at will. The mere creation of the estate in two or more persons, without more, drew to it the incident of survivorship: See 2 Blackstone's Commentaries, 180. In Georgia the mere creation ⁶⁷⁷ of the estate in two or more persons never draws to it survivorship as an incident, and the presumption is in all cases that survivorship was not intended. But where, by express terms or necessary implication, a survivorship is provided for, the law of Georgia allows it to exist. This exact question has been passed upon in other states having statutes abolishing the doctrine of survivorship as applied to joint tenancies. In *Arnold v. Jack*, 24 Pa. St. 57, the supreme court of Pennsylvania held that, though survivorship as an incident to joint tenancies had been abolished in that state, it might be expressly provided for by will or deed, Knox, J., in the opinion saying: "But conceding that the right of survivorship, as an incident of a joint tenancy, no matter how created, is gone, it by no means follows that this right may not be expressly given, either by a devise in a will or by grant in a deed of conveyance. It may cease to exist as an incident, and yet be legally created as a principal": See, also, *Jones v. Cable*, 114 Pa. St. 586, 7 Atl. 791; *Sturm v. Sawyer*, 2 Pa. Sup. Ct. Rep. 254; *Lentz v. Lentz*, 2 Phila. 148. In the case of *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202, the supreme court of North Carolina held that the act abolishing survivorship in estates in joint tenancy did not prohibit contracts making the rights of the parties dependent on survivorship. In the opinion Avery, J., said: "The act of 1784 (Code, sec. 1326) abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties upon the fact of survivorship": See, also, 17 Am. & Eng. Ency. of Law, 2d ed., 650.

The remaining grounds of the application for a rehearing relate to matters which were fully discussed and carefully considered. Attention is called in the motion for a rehearing to the case of *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850. Even if this case can be considered as antagonistic to the conclusion reached in the present case, we find nothing in the reasoning of the court which dissatisfies us with the conclusions we have reached. In addition to the cases cited in the original opinion on the question of what constitutes a lottery,

we take this occasion to call attention to the following: *Hall v. Cox*, 1 Q. B. 198; *Regina v. Dodds*, 4 Ont. 390; *Regina v. Jamieson*, 7 Ont. 149; *Stoddart v. Argus Printing Co.*, 2 K. B. 474; *Dunham v. St. Croix Mfg. Co.*, 34 N. B. 243; *United States v. Rosenblum*, 121 Fed. 180.

While the differences of opinion among the justices of this court, as indicated by the opinions filed still exist, so far as the merits of this controversy are concerned, we are all agreed that no sufficient reason has been given why this case should be re-argued.

Application denied.

In a Dissenting Opinion Justice Lamar, with whom concurred Chief Simmons, stated his view of the law in the following form and language: The company issued certificates (Class "A") by which it promised to pay the holder five hundred and five dollars and fifty-four cents on condition that he should pay one dollar and twenty-five cents monthly for one hundred and thirty months, he agreeing to surrender his certificate for redemption at a value fixed by a sliding scale, by which, if redeemed one month after date, fifteen dollars was to be received, if two months eighteen dollars, and so on, the value increasing three dollars with each installment paid. Certificates to be redeemed were not selected in numerical order, but according to a table using multiples of "three," under the operation of which younger certificates could be called in before those of older date. A cash payment of four dollars, besides twenty-five cents per month for one hundred and thirty months, was to be applied to expense account. Certificates not matured by the multiple table were, at the end of one hundred and thirty months, to receive five hundred and five dollars and fifty-four cents for one hundred and sixty-six dollars and fifty cents paid in. On failure to pay any monthly installment a fine of fifty cents was imposed, and if not paid by the succeeding month the certificate lapsed, and the holder forfeited all payments and fines. The United States postal authorities held this to be a lottery, and the mails were closed against the company. Retaining the scheme of lapses, and the device of a multiple table to determine what certificates should be redeemed, the company thereupon issued another form of certificate (Class "B") substantially like the foregoing, except that it promised to pay five hundred dollars instead of five hundred and four dollars; the number of installments was raised to one hundred and sixty-eight; certificates were to be redeemed out of the profits on payment to the holder of the total amount which he had paid in, with eight per cent interest thereon, together with his proportion of all fines and lapses. Holders of certificates not called in under the device of the multiple table during one hundred and sixty-eight months would pay in two hundred and fourteen dol-

lars, of which forty-six dollars was deducted for expenses, leaving one hundred and sixty-eight dollars to be invested, and for this two hundred and fourteen dollars the company absolutely promised to return five hundred dollars, necessitating that it should earn twenty-eight per cent profit per annum and pay the holder one hundred and thirty-three per cent, or nineteen per cent per annum average interest. The company issued a half million dollars of these certificates, Class "B." It had a capital stock of only two thousand five hundred dollars, and no other property except that paid in by the certificate holders, and the funds or property in which the certificate holders' money was invested. Held:

1. Class "A" certificates constituted a lottery, and Class "B" was not essentially different therefrom, being in the nature of a lottery scheme, prohibited by the act of 1877 (Acts 1877, p. 112), as amended by the act of 1881 (Acts 1880-81, p. 62).

2. A court of equity should afford relief to a litigant expressly asking aid against such a contract, more readily than the postal authorities would volunteer to act on behalf of the public, which was not actively seeking protection.

3. In a number of instances where substantially similar schemes have been under review the courts have held the same to be illegal, contrary to public policy, and void. Among many others see *Horner v. United States*, 147 U. S. 460, 13 Sup. Ct. Rep. 409; *State v. Interstate Inv. Co.*, 64 Ohio St. 283, 83 Am. St. Rep. 754, 60 N. E. 220 (where the effect of the table of multiples was involved); *Peltz v. Supreme Financial Union (N. J.)*, 19 Atl. 668 (2); *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 South. 586. The case of *Union Investment Assn. v. Lutz*, 50 Ill. App. 176, contra, is not a decision by a court of final resort.

4. Such holding is not solely in the interest of the certificate holder who desires to discontinue the illegal scheme, but also in pursuance of a sound public policy and to prevent similar schemes from being launched.

5. To have selected certificates for cancellation by the usual methods of lot would have involved the element of chance; to have selected them in numerical order would not have involved the element of chance; to select them by the device of the multiple table making older certificates mature after younger, and where even this order was interfered with by lapses, was essentially a selection by lot, and was within the prohibition of the act of 1877: *State v. Interstate Savings Inv. Co.*, 64 Ohio St. 283, 83 Am. St. Rep. 754, 60 N. E. 220.

6. The scheme here involved chance on chance, by which an early redemption was a return of the amount paid in, with about ten per cent interest, and amounted to a small prize, if, later on, the scheme failed for want of lapses. To have the certificate redeemed at the end of the one hundred and sixty-eight months secured principal and one

hundred and thirty-three per cent profit, and was the greater prize, if the number of lapses proved sufficient to enable the plan to work out to the end of one hundred and sixty-eight months.

7. In determining whether the scheme is possible without undue lapses, the courts must exclude from the calculation windfalls, extraordinary and improbable rises in value of investments, and consider the risks of business, current rates of interest, and the fact that if such a scheme, without aid from undue lapses, were regarded as possible by men of ordinary business prudence, the enormous profits promised would attract millions of capital from the more useful channels of trade and commerce.

8. The evidence discloses that out of two hundred and forty thousand dollars, total profits earned, forty-nine per cent of such profits, or one hundred and nineteen thousand dollars was derived from lapses, and that but for such lapses the company could not have redeemed the certificates already called in, and on which about ten per cent interest was paid.

9. There is an absolute promise to pay five hundred dollars for every two hundred and fourteen dollars paid in on certificates which mature at the end of one hundred and sixty-eight months. This involves the necessity of the company earning enough on each one hundred and sixty-eight dollars to pay back the forty-six dollars appropriated for expenses, together with one hundred and thirty-three per cent on one hundred and sixty-eight dollars, equal to an average annual interest of twenty-eight per cent on the one hundred and sixty-eight dollars invested, and a dividend of nineteen per cent per annum to the certificate holder.

10. A provision for incidental lapses does not render a scheme illegal. In legal and valid insurance contracts the element of a lapse is incidental, and the policy holder has at all events received value in actual protection by insurance during the premium term. In strict tontines the lapses are not necessary to the success of the scheme, for all can remain in to the end of the period and get their share of the fund, whatever it may prove to be.

11. Equity abhors lapses, and will relieve against forfeitures: *South Carolina etc. R. Co. v. Augusta Co.*, 107 Ga. 182, 33 S. E. 36. A scheme largely depending on lapses for its success is illegal and contrary to public policy, for the reason that the lapses do not represent earnings of the company so much as losses of those unfortunates who, having started, are unable to hold out to the date of maturity. Equity is unwilling that others should reap that which they did not sow.

12. The guaranty to pay much for little appeals to that cupidity, and desire to "get rich quick," which makes the scheme contrary to public policy, and calls for action by a court of equity to protect those who, tempted by the guaranty of five hundred dollars for two hundred and fourteen dollars paid in, are blind to the fact that they

may be among the lapsed. Equity will act all the more quickly because those who are financially the weakest are most likely to lapse, to the benefit of the stronger who can continue to pay until the end of the term.

13. The right to make contracts is not unlimited: Civ. Code, sec. 3668. The same public policy which forbids lotteries and futures, and which protects the necessitous from usurious contracts, will in like manner protect those who have been induced by the promise of usurious profits to go into a scheme depending for its performance on lapses, in which many must lose in order that few may gain.

14. The maxim, "In pari delicto," etc., or that courts will not ordinarily interfere where parties to an illegal contract are equally guilty, does not apply here, because the parties are not on a parity.

(a) Nor does it apply where the contract is executory and in course of performance, as here.

(b) Nor does it apply, for the further reason that the defendant company really had no interest in the appropriation to be made of the fund by the court. It has been paid four dollars, together with twenty-five cents monthly, for investing a fund. It is in effect the agent of the certificate holder, and the money in its hands is a trust fund, the real owners being the subscribers. Any holder, on proof of the insolvency of the agent or the impossibility of the ultimate performance of the scheme without undue lapses, is entitled to have the illegal scheme discontinued and the trust property placed in the hands of a receiver of distribution among the true owners.

15. If the scheme continues in operation, each certificate holder must still pay, in order to avoid a lapse with the forfeiture of all that he has contributed. Equity will not force him to continue the illegal payments, nor to run the risk of a forfeiture by his withdrawal. Before the contract is finally executed, it allows a locus penitentiae to those who desire to have the scheme discontinued; and in aid of those seeking the discontinuance of the scheme the court will administer the trust fund for the benefit of the true owners: *McLaughlin v. National Inv. Co.*, 64 Fed. 908.

What is a Lottery is the subject of a monographic note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48. For contracts of investment debentures or certificates held to be lotteries, see *State v. Interstate Sav. etc. Co.*, 64 Ohio St. 285, 83 Am. St. Rep. 754, 60 N. E. 220. And consult, in this connection, *State v. Hawkins*, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328, and cases cited in the cross-reference note thereto.

**SMITH ROOFING AND CONTRACTING COMPANY v.
MITCHELL.**

[117 Ga. 772, 45 S. E. 47.]

BANKING—Payment by Charging Amount of Check to Drawer's Account.—If the payee in a check deposits it for collection in a bank, which forwards it to the drawee bank for payment, an entry on its books by the latter bank charging the amount of the check to the drawee's account discharges him from liability on the debt for which the check was given, notwithstanding the drawee bank withholds the money from the collecting bank and fails to enter the proper credit to its account. (p. 219.)

C. J. Lester, for the plaintiff.

772 CANDLER, J. Mitchell gave to the O. A. Smith Roofing and Contracting Company a check on the Barnesville Savings Bank, for the amount of a debt due by him to it. This check was dated November 21, 1901, and was on that day deposited by the company with the Third National Bank of Atlanta. The Atlanta bank immediately forwarded the check to the bank in Barnesville, where, on November 22d, it was received and marked paid, and the amount of the check charged to the account of the drawer, who had sufficient funds on deposit in the bank to meet the check. Subsequently the canceled check was turned over to Mitchell. On December 4, 1901, an officer of the Barnesville Savings Bank called upon Mitchell and asked him for the check, without stating what he wanted with it. Mitchell gave it to him; whereupon the check was by the Barnesville bank protested for nonpayment, **773** returned to the Third National Bank of Atlanta, and by that bank returned to the O. A. Smith Roofing and Contracting Company, to whose order it had been drawn. On December 4, 1901, the day when it returned the check to Atlanta, the Barnesville bank failed and went into the hands of a receiver. The O. A. Smith Roofing and Contracting Company, having complied with all the requirements of the law, brought suit to foreclose its materialman's lien for the debt to pay which the check was given. The defendant pleaded payment. The case was tried by the court, without a jury, on an agreed statement of facts, the substance of which has been given; and judgment was rendered for the defendant, whereupon the plaintiff excepted.

As will have been gathered from the foregoing, the sole question for our determination is whether the giving of the check by the defendant, the presentation of that check at the bank upon which it was drawn, and the action of the bank in charging the amount of the check to the defendant's account and returning the canceled check to him, constituted such a payment by the defendant of his debt to the plaintiff as will discharge him from liability to it. When the O. A. Smith Roofing and Contracting Company deposited the check for collection with the Third National Bank of Atlanta, it made that bank its agent for the purpose of collecting the check. The Third National Bank, in its turn, made the Barnesville Savings Bank its agent for the same purpose. It is not denied that Mitchell had ample funds in the Barnesville bank to meet the check. The check was canceled Mitchell's account was duly charged, and the paper turned over to him. When that was done, Mitchell no longer owed the debt for which his check had been given, for the check had been paid; and the next step in the proper course of the proceedings would have been for the Barnesville bank to send the money called for by the check to the Third National Bank of Atlanta. It is contended, however, that the defendant, by returning to the officer of the Barnesville bank the canceled check which had been returned to him, placed it in the power of that bank to commit a fraud, and that therefore he should be held liable for the amount of the check. We cannot see the force of this reasoning. The fraud committed by the Barnesville Savings Bank was the failure to remit to the Third National Bank of Atlanta the amount of the check. The return of the check to the Atlanta bank marked ⁷⁷⁴ both "paid" and "protested for nonpayment" was not the fraud—it was simply an attempt on the part of the Barnesville bank to conceal the wrong that it had done. The possession by Mitchell of the canceled check was merely a receipt—an evidence of payment. It is admitted that Mitchell had a right to the possession of the check; and it would seem to follow as a logical conclusion that the fact that the check had been paid is also admitted.

A case very closely in point is *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717. There a check on a bank in Wilmington, North Carolina, was deposited for collection in a bank in Augusta. The check was forwarded promptly to the bank on which it was drawn, and the amount charged to the account of the drawer on the books of that bank.

A few days thereafter, the drawee bank suspended payment and went into the hands of a receiver, without having forwarded the amount of the check to the bank in Augusta. Suit was brought against the Augusta bank by the holder of the check, who had deposited it for collection, and the trial in the lower court resulted in favor of the defendant. The judgment was reversed on writ of error to this court, where it was held that the Augusta bank "became, in the absence of any express or implied contract to the contrary, liable for any neglect of duty whereby the collection of the check was defeated, whether such neglect arose from the default of its own officers or from that of its correspondent or agent to whom it may have sent the check for collection, and in such case it would be immaterial whether such correspondent or agent was the bank upon which the check was drawn or another." We do not, of course, lose sight of the fact that that was a suit by the indorsee of the check against the bank with which it had been deposited for collection, while this is a suit by the payee against the drawer of the check. The facts of that case, however, are very similar to those of the case at bar; and the principle there laid down is directly applicable as indicating where the liability in the present case rests: See, also, *Comer v. Dufour*, 95 Ga. 376, 51 Am. St. Rep. 89, 22 S. E. 543; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160. "A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given. This rule has been applied where the bank held the check for several ⁷⁷⁵ days, during which the drawer's account was not good, and then, the account becoming good, made the application: 2 *Morse on Banks and Banking*, 3d ed., sec. 451. And so, in this case, the entry on the books of the Barnesville Savings Bank, charging the account of its depositor with the amount of the check, was the same as if it had paid the money over its counter to itself as agent for the bank which had sent the check for collection; and the fact that it fraudulently withheld the money from that bank and failed to enter the proper credit to its account does not render any less complete the payment by the depositor. That money is now in the hands of the agents of the payee of the check, and the drawer is as completely discharged from any further liability on the debt for which it was given as if he had

paid the actual money to one authorized by his creditor to collect it.

Judgment affirmed.

All the justices concur.

As Bearing the Principal Case, see *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160.

SMITH v. WILLIAMS.

[117 Ga. 782, 45 S. E. 394.]

SALE—Breach of Warranty of Title.—The Measure of Damages on a breach of warranty of title to personal property, is the purchase money, with interest, and expenses properly incurred by the vendee in attempting to defend his title. (p. 221.)

SALE.—A Warranty of Title in a sale of personal property is not negotiable, and does not run with the article sold. (p. 222.)

SALE—Breach of Warranty of Title.—The Measure of Damages against the original warrantor of the title to personal property cannot be increased by reason of liabilities subsequently incurred by his vendee on account of independent warranties of the same property to later purchasers. (p. 222.)

SALE—Breach of Warranty of Title.—Attorney's Fees cannot be recovered by a vendee in a suit for a breach of warranty of title, where there is no allegation that the vendor was guilty of fraud or bad faith when he made the sale. (p. 222.)

Greene F. Johnson, for the plaintiff in error.

George & Anderson, for the defendant in error.

783 LAMAR, J. In 1900 Smith sold personal property to Williams with warranty; Williams sold to Newton with warranty; Harris on a title outstanding in 1896 recovered the property from Newton, who thereupon sued Williams on breach of warranty, claiming and recovering as damages the purchase money, attorney's fees and costs expended by Newton in defending against Harris' title, and attorney's fees for bringing the suit against Williams. Smith had notice of this suit, but failed to defend when requested so to do by Williams. Thereupon the latter sued Smith for the breach of warranty, claiming as damages all of the items recovered by Newton, and also attorney's fees for bringing the present action. Smith moved to strike all claims for costs and attorney's fees in the previous suits, and also the

attorney's fees claimed for bringing the present suit; which motion being overruled, he excepted.

Of course, the grantor of land is liable to his immediate grantee, who has been evicted, for the purchase money with interest, and expenses incurred by him in defending the title; but not for expenses incurred in a series of suits for breach of warranty by remote grantees holding under but not immediately from him. Where there have been successive sales with successive warranties, and a breach arising from an outstanding title existing at the time of the sale by the common grantor, it is evident that if separate suits be brought by each grantee, and the costs and attorney's fees are to be carried forward, and finally paid by the original warrantor, these items, as here, may finally become of as much importance as the liability for the purchase money. Each sale is a separate transaction. Each vendor is liable for his own contract, and to the extent thereof. ⁷⁸⁴ But he cannot enlarge his prior vendor's obligation beyond that fixed by law. The measure of damages is the purchase money with interest and expenses properly incurred by the vendee in attempting to defend his title; but not for expenses incurred by others in asserting or defending rights warranted by their immediate vendor, even though they be also derived by a chain of title from the remote warrantor. Such a rule would make Smith liable to Williams not only for expenses incurred under his warranty to Williams, but for those under Williams' warranty to Newton, and under Newton's warranty to his vendee, and so on ad infinitum. These increased elements of damage could not be collected even on a sale of land, here the benefit of the warranty and the right to sue thereon passes to each successive vendee: Civ. Code, secs. 3612, 3864. For a much stronger reason it would not apply to a sale of personal property with warranty. It is true that in *Dukes v. Nelson*, 27 Ga. 463, Benning, J., said that he could conceive of cases in which, in his opinion, the vendee would be entitled to the benefit of a warranty made to his vendor. Where personal property is sold, and there are defects latent and concealed, and unknown to the vendee, and a subsequent purchaser is injured by reason thereof, an action for damages sounding in tort may sometimes arise against the one negligently putting the thing into circulation: *Longmeid v. Holliday* 20 L. J. Ex. 430; *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398. Compare Civil Code, sections 3864, 3865, as to sale of unwholesome provisions and adulterated drugs. But a warranty of soundness is not negotiable (*Dukes v. Nelson*, 27

Ga. 463); and if so, there is no reason why a warranty of title in the sale of personal property should stand on any different footing. A warranty does not run with the article sold. If the title is not good, the vendee must look to him from whom he purchased, and to whom he paid the consideration: *Central Ry. Co. v. Ward*, 37 Ga. 531. The remedy of the subsequent purchaser is against his immediate seller, and not against the original owner.

We are not dealing with the rights of the holder of negotiable or quasi negotiable paper (Civ. Code, sec. 3685; *McCay v. Barber*, 37 Ga. 423; *Lemmon v. Strong*, 59 Conn. 448, 21 Am. St. Rep. 123, 22 Atl. 293); nor with the rights of the purchaser of a draft with bill of lading, elevator receipt, or papers described in the Civil Code, section 2956: *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251.

⁷⁸⁵ Smith was not vouched into the suit by Harris against Newton, and is therefore not concluded by that judgment, even if the Civil Code, section 3617, applies to that class of cases. The fact that he was asked to intervene and defend in the suit by Newton against Williams for damages would not bind him for any element of damages for which he was not responsible, even though Newton sued Williams and recovered attorney's fees in that suit, and for fees and expenses previously paid by Newton in the effort to defend the title litigated in the Harris suit. Smith's liability and the measure of damages to be recovered against him on breach of the warranty was fixed by law at the time he sold, and could not be increased by reason of contracts or liabilities subsequently incurred or paid by his vendee.

Nor is Smith liable for the attorney's fees incurred by Williams in bringing the present action. There is no charge that he knew that the title was defective when he made the sale; no allegation of fraud or deceit, or that he acted in bad faith: Civ. Code, sec. 3796.

Judgment reversed.

All the justices concurring.

Warranties of Title in sales of personal property are discussed in the monographic note to *Scott v. Hix*, 62 Am. Dec. 460-468.

CENTRAL OF GEORGIA RAILWAY COMPANY v. MOTES.

[117 Ga. 923, 43 S. E. 990.]

CARRIERS.—The Reasonableness of a Regulation of a carrier, affecting the transportation of passengers, is a question of law for the court. (p. 229.)

CARRIERS—Right to Sleep in Waiting-room.—A railway company may insist that such of its patrons as contemplate taking a morning train shall, if they desire to sleep, find quarters other than its waiting-rooms. (p. 231.)

CARRIERS—Injury to Passenger by Employé.—A passenger who persists in sleeping in a waiting-room contrary to a regulation of the railway company, and so exasperates an employé of the company as to unfit him for his duty, cannot complain that, instead of being ejected from the room, he was wrongfully treated with unnecessary harshness and then permitted to stay there. (p. 232.)

Hall & Wimberly, J. E. Hall and R. D. Feagin, for the plaintiff in error.

H. A. Mathews and Guerry & Hall, for the defendant in error.

924 **SIMMONS, C. J.** An action sounding in tort was brought by Isaac Motes against the Central of Georgia Railway Company, to recover damages for an assault alleged to have been committed upon him by an employé of the company. On the trial of the case the plaintiff was introduced as a witness in his own behalf, and testified substantially as follows: About the 5th of January, 1901, he purchased at Griffin a ticket entitling him to be carried over the line of the defendant's road from that point to Fort Valley. He took passage upon an afternoon train, which ran as far as Macon, an intervening station, and arrived there about 7 o'clock. He was asleep when the train "rolled into the depot, and . . . was not aroused until all the passengers were off," when "the conductor, or porter, or some official, came through and waked" him up. He then got off on the left-hand side of that train, and inquired of a man wearing the uniform of a porter what train he should take in order to reach his destination. Being directed to a train on the right-hand side of that he had left, he boarded the former; but after it had proceeded some distance from the depot, he learned that it was not "the right train to Fort Valley," and thereupon "got off the train and walked back." On his return to the station he made inquiry at the ticket-office concerning the train he should have taken, and was informed it had left, and he would be compelled to wait for the next train passing through Fort Valley, which

would not leave Macon until early in the morning of the following day. He then "proceeded to the waiting-room"; and, as he "was tired and sleepy from the fatigue of the day, . . . laid down across the benches and went to sleep." Shortly afterward, the official in charge of the waiting-room came and waked the plaintiff, telling him "that was not a hotel; that the benches were made to sit on." As soon as this official went out of the room, the plaintiff "laid back down in a reclining position," not "in the same position" he ⁹²³ had before assumed, but in one which admitted of his resting upon his elbow and allowing his feet to hang off the seat. "It was not but a short while before the" official just mentioned came back into the room, pulled the plaintiff up, and told him he would send him to a hotel; that "he could not sleep there." In reply, the plaintiff said he "did not care to go to a hotel." The official again left; whereupon the plaintiff "slipped back on the seat, where [he] could lay [his] head on the back of the seat." He "did not lay down that time," but put his "head on the back of the seat" and closed his eyes. "In a few minutes [he] was disturbed again by the same" official, who "pulled [him] out of [his] seat and jerked [him] around a little." Plaintiff had his coat buttoned up. The official pulled it open, "jerking off some buttons," and threatened to carry plaintiff to the "courthouse" and lock him up. After shaking him, and while still having hold of him, the official demanded that the plaintiff show his ticket, and compelled him to exhibit it before he was turned loose. The official "did not make any apology for his conduct," when shown plaintiff's ticket, but remarked that he "didn't have any business there, any way," as he should have gone on the train" which he had missed. Plaintiff was not further molested in any way, and left Macon on the morning train for Fort Valley. His coat was not injured, save that the top button was torn off. "The other buttons came unfastened," as the company's official took hold of the plaintiff's coat where it came together at the collar. He "was not drinking that night," but was merely drowsy and sleepy. He was pulled up out of his seat the last time he was disturbed; "was not to say sound asleep at the time, [but] was in a dozing manner." Was pulled to his feet, though not carried off further than a few feet. The benches in the waiting-room were placed back to back, and were provided with small arms, so arranged as to divide the benches into seats. "The sitting-down places were entirely separated from each other all the way across," and the seats were "large enough for a person to sit on."

During the course of the plaintiff's examination while on the witness stand, he stated that he did not remember having made any remarks to the official in charge when the latter first aroused him from his slumbers and told him he could not sleep in that room, as it was not a hotel, and the benches were made to sit on; though, ⁹²⁶ the witness said, he "might have made some remark." He admitted he paid no regard to what this official said as to how he should conduct himself, and immediately lay "down in a reclining position to rest, after he went out, [and] as a matter of fact" did again go to sleep. Upon being again awakened and told he would be sent to a hotel, he replied he "didn't care to go to a hotel; that [he] would spend the night there." The railroad official doubtless understood him to mean by this remark that he did not intend to observe any regulation of the company with respect to the right of passengers to regard its waiting-room as a lodging-house; for it affirmatively appears from the testimony of another witness, whom the plaintiff himself introduced, that in point of fact he did make an offensive reply to the company's official when first approached by him and told he must not sleep in the waiting-room. In this connection, the witness testified: "I just noticed the officer shake the young man awake, and tell him that he must not sleep in the waiting-room; that if he wanted to sleep, he had better go to the hotel. The young man replied that he would sleep if he felt like it." According to the account given by this witness, "the officer went out of the room and returned in . . . about twenty or thirty minutes, and walked to where the young man was sitting, and jerked him out of his seat and tore the buttons from his coat," taking hold of him rudely, and using him "pretty rough." The witness further undertook to assert that the plaintiff had not lain down on the benches at any time previously, and was sitting quietly in his seat asleep when thus rudely aroused—"leaning on his hand, sitting in the seat." Witness "saw the officer approach the young man twice" only. The second time, "the officer jerked the young man from his seat to the floor, or to his feet, and said that he had told him not to sleep in there, and that he would see he did not do so." Witness was himself "asleep part of the time that night in the waiting-room and was not disturbed by the officer at all"; but neither he nor anyone else present was, he said, "stretched on the benches asleep," and the "young man never laid down." Not only as to this last statement, but in other respects, the testimony of this witness

differed essentially from what the plaintiff admitted was the truth with regard to what actually occurred.

The only other witness who testified on the trial was the company's official who had charge of its waiting-rooms on the occasion ⁹²⁷ under investigation. He explained that there were "three waiting-rooms at the depot: a colored waiting-room, a general waiting-room, and a private waiting-room for ladies," which was a small room opening into the general waiting-room. Ladies usually sat in this small room when unaccompanied by gentlemen, though the general waiting-room was provided for the accommodation of both sexes. While there were "no printed regulations for the government of the waiting-rooms at the Union Depot," there were verbal ones with regard to lying down on the benches, and as to sleeping in the general waiting-room; and the witness had been a number of times instructed not to permit a violation of these regulations. It was his duty to preserve order in and about the depot, and his "jurisdiction embraced the waiting-room" set apart for ladies and gentlemen, to which the plaintiff went. He was first seen by the witness somewhere between 8 and 9 o'clock, and was then in this waiting-room, sitting by the stove, with several others. "The next time [witness] went in there, he was lying down on the seat. He had moved down to the end of the seat then, and had his head on" one of the arms, and was "stretched out full length on the bench." Witness "went to him and tried to get him to get up then, and told him to sit up, but he didn't do it. He just let his foot down off the seat, and lay there." A train was backing into the car-shed at the time, and witness had to leave to attend to other duties. When he returned to the waiting-room, plaintiff was still lying there, and witness "asked him again to get up and sit up," saying "that was not any place to sleep; that if he wanted to sleep, he must go and get a room." Plaintiff said he would, if witness would pay for it; but this the latter declined to do, and "insisted on his getting up and sitting up, and he would not do it. He would not make any move to do it, and [witness] caught hold of his coat right there, in order to pull him in a sitting position, not to pull him off the seat. A button broke off. He got up then and picked the button off the floor and stood up in the floor, and then was the time [witness] asked for his ticket, and he said he had it." Witness asked to see it, but plaintiff replied he "never had any business to see it until train time," and that "when he [plaintiff] started through the gate, he would let" witness see it. Witness told him he would have to show his

ticket or get out; "that he would not stay there unless he did let [witness] see it. He finally offered it," ⁹²⁸ though he held on to one end of it, and witness "saw enough to see where it was to and from." Nothing further was said, save that witness "told him he had no business there; that his train was gone, and if he came from Griffin he ought to have gone on the Albany train right on to Fort Valley." Witness approached the plaintiff only twice. "He was lying full length on the bench both times. . . . He was lying with his body over the arm the second time, with his head on the arm of the seat, and he was occupying two seats then." Witness asked for his ticket in order to ascertain whether or not he was a passenger; whether "he was going anywhere or not," and whether "he had any right to the building or not. Passengers are not allowed to lie across benches; it does not matter how many tickets they have." Witness "did not see anyone else in the waiting-room lying across the benches asleep. There were cards hung on the back of each train in that shed at that time for the guidance of the people, showing what train it was, and where it went to. That was true in every instance at that time." Plaintiff "explained how he got left."

1. The trial judge refused to give in charge to the jury the following written request: "If you believe from the evidence that the plaintiff, Isaac Motes, after being informed by the officer of the defendant company, who was in charge of the white waiting-room, that he could not sleep across the benches in such waiting-room, or could not lie across said benches for any purpose; and if you believe from the evidence that Motes persisted in lying across said benches, after having been informed by the officer in charge that he had no right to do so, then I charge you that the officer in charge had the right to use such force toward Motes as was necessary to enforce the regulation." As will be noted, this request to charge was based upon the assumption that, as matter of law, the regulations adopted by the company with respect to lying across benches and sleeping in its waiting-room were reasonable. His honor did instruct the jury in general terms that the "defendant's agent was authorized in law to use such force as was necessary in enforcing reasonable regulations of the company," and further told the jury that it was for them to determine whether or not, in point of fact, the particular regulations adopted by the defendant company were, under all the circumstances, reasonable and proper. Apparently the jury found they were not. The question is, therefore, presented ⁹²⁹ whether it was or was not within the province of the jury.

to determine this all-important matter. We think not. "A railroad company has an implied authority (which is necessarily almost absolute) to make and enforce all reasonable rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employes, and to protect itself from imposition and wrong": 1 Elliott on Railroads, sec. 199. "To this end," carriers of passengers "may regulate the purchase of tickets, the time and manner of procuring and paying for the same, and the time and manner of surrendering them; the manner and time of entering and leaving the cars; and the conduct of the passengers while upon the cars or at stations waiting for trains, as that they shall not be boisterous or disorderly. . . . Rules and regulations in regard to separate cars for ladies and their escorts" have been upheld as reasonable, as have also rules "prohibiting disorderly conduct on the cars." And it is the right of common carriers to "exclude from their carriages and premises such persons as refuse to comply with their reasonable regulations": 1 Elliott on Railroads, sec. 200. "The reasonableness of such regulations and the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the court to decide, if any fixed and permanent regulations are to be established, and the better authority holds it to be such; since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable. . . . There are, doubtless, many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts or circumstances, and, where this is true, it may, perhaps, be called a mixed question of law and fact; but, when the facts are undisputed, we think it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court": 1 Elliott on Railroads, sec. 202. Says no less an authority than Judge Thompson: "Whether a certain rule of a railway corporation be reasonable and therefore valid is a question of law for the court—the general rule being that the reasonableness of the by-laws, rules and regulations of corporations, whether private or municipal, is to be decided as a question of law, and that such a by-law, ^{rule} rule or regulation, if unreasonable, is to be held void as matter of law; and it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the de-

cision of a jury": 1 Thompson on Trials, sec. 1057. The subject came under discussion in the case of Southern Ry. Co. v. Watson, 110 Ga. 682, 690, 36 S. E. 209, wherein the question arose as to whether or not a carrier of passengers could lawfully undertake to limit the time in which a railroad ticket should be used. In this connection, Mr. Justice Little, who delivered the opinion of the court, said: "All the authorities which support the doctrine that a railroad company may by rules and regulations limit the time in which a ticket can be used for passage concur in the view that such regulations must be reasonable, and whether or not a regulation of this character is or is not reasonable is a question to be determined by the court. On this subject, the rule, as we understand it, is, that where the facts are not disputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury: See, also, the cases cited on page 690, 110 Ga., and page 213, 36 S. E.

2. We shall not at this time undertake to do more than determine whether or not, as regards a waiting-room in a city such as Macon, where weary travelers may, if they wish, procure suitable accommodations for rest and comfort, regulations forbidding the use by passengers of benches as beds, or any other attempted transformation of a railroad waiting-room into a lodging-house, tend to deprive passengers of inalienable rights, or are for any other reason to be regarded as despotic and unreasonable. It is pertinent here to remark that there was no evidence introduced on the trial touching any rule promulgated by the railroad commission of this state with respect to the duty of a common carrier to furnish lodgings to such of its patrons as find it convenient to present themselves at the carrier's depot during the night, there to remain until the scheduled departure of a morning train several hours later. Nor have we been cited to any common-law or statutory rule which imposes upon a railway company any such duty toward such patrons, or to one holding a ticket, who, through his own fault or misfortune, has missed an evening train. Accordingly, we shall endeavor to decide on principle whether such a duty does or does not, as a general thing, exist. It seems reasonable to assert that a ⁹⁸¹ railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting-room until an hour or so before the departure, on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting-

room open all night for the accommodation of its patrons, permitting them to enter it at any time they chose, on condition that they would not abuse the privilege thus accorded them, by undertaking to wrest from the carrier a night's sleep to which they were not entitled. Many good reasons might be suggested why the carrier would be unwilling to extend an unqualified invitation to enter at will and stay as long as desirable. For instance, passengers expecting to take a particular train might, if permitted to indulge in opportune sleep, miss the train and be left complaining on the carrier's hands, instead of making a timely and orderly departure and giving place to other passengers entitled to enter its waiting-room and partake of the accommodations it afforded. Again, the carrier could have a laudable ambition to so conduct its waiting-room that passengers of culture and refinement might be spared the disgust of witnessing the uncouth and unseemly behavior of a different class of travelers, whose sense of decency fails to suggest to them the impropriety of sprawling over or upon benches or seats designed for a purpose other than that of affording an opportunity to retire for the night in a grotesque, if not offensive, attitude of repose. The reasonableness of a regulation adopted by a carrier of passengers with respect to the use to be made of its premises is not to be arbitrarily determined by applying the test whether or not such regulation would be reasonable if adopted by a carrier of livestock. The circumstances of time and place are to be given due consideration. On the western frontier, years ago, the reasonableness of attempting to regulate the "shooting out" of station lights by waiting passengers might have been seriously questioned by at least some members of the traveling public. To-day there is doubtless a growing sentiment in all parts of the country against converting into a smoking apartment a general waiting-room provided for the accommodation of both sexes, as well as against treating with contempt the invitation held out by the station-house "sand-box" or cuspidor, and other minor infractions of the laws of etiquette which obtain in polite society. The evolution which has taken place along this line ⁹³² cannot properly be ignored by the courts; for carriers of passengers are to be encouraged, rather than disheartened, when they manifest a disposition to improve conditions which have become almost intolerable. To furnish adequate and comfortable accommodations to the traveling public is an exacting and serious business, not mere vain and expensive trifling. A prospective traveler who purchases a railroad ticket with a view to going on a journey

does not thereby acquire a right to demand of the carrier that he be allowed to enter its waiting-room eight hours or so before the train he expects to take is due, and there go to sleep as a matter of course. To miss his train will not change his status from a waiting passenger into a guest entitled to demand a place wherein to sleep until the next train bound for his destination arrives, or transform the carrier into an innkeeper or proprietor of a lodging-house. Indeed, he would stand upon no better footing than would a patron of a public eating-house, who, after missing his supper through his own tardiness, might, simply because he was the holder of a meal ticket, unreasonably claim the privilege of occupying a chair at table in the room where meals were served, and there passing his time in sleep until the arrival of the breakfast hour. Accordingly, we hold without hesitation that a railway company may with propriety insist that such of its patrons as contemplate taking a morning train shall, if they desire to refresh themselves by slumber during the intervening night, find quarters other than its waiting-rooms.

3. According to the version given by the plaintiff himself touching what occurred prior to the time he was assaulted by the station agent, a finding against the defendant company was wholly unauthorized. Notwithstanding the plaintiff was expressly notified of the above-mentioned regulations of the company governing its waiting-room, he manifested a persistent determination to pay no regard to the same, and displayed a disposition to irritate and move to anger the official whose duty it was to enforce them. After being twice told by that official that passengers were not permitted to sleep in the waiting-room, the plaintiff confesses he waited until the official again left the room, and then "slipped back on the seat," where he could lay his head on the back of it, closed his eyes, and dropped off into slumber. While he says he "did not lay down that time," it is evident that he knew the official would protest, if present, against his thus assuming an undignified and sprawling attitude ~~and~~ which enabled him to use the back of the seat as a pillow and resume his nap at the point where it had been interrupted. He did not undertake to assume this position until the officer again left the room, nor in good faith try to observe the rule against using the benches for a purpose other than that for which they were provided. From the beginning to the end of his altercation with this official, the plaintiff spoke and acted in a manner well calculated to bring down upon himself the harsh treatment he finally suffered at the hands of the company's agent. Should

it in good conscience be held responsible therefor? The reply to this inquiry is to be found in the report of the case in *Peavy v. Georgia Ry. Co.*, 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, wherein it was pertinently remarked that: "It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty." The doctrine laid down in that case was subsequently recognized and applied in *City Electric Ry. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508, and in the cases cited on page 35, 101 Ga., and page 508, 28 S. E. In *Georgia Ry. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, the plaintiff sought to recover damages because of an assault which the company's night watchman committed upon him while he was at the station waiting for a train; but it appearing that the plaintiff had himself been guilty of grossly improper conduct, and had exasperated the company's agent by the use of offensive and insulting language to and of him, this court held the company was not liable for the consequences of such assault, even though the agent may not have been fully excusable, and the battery inflicted was entirely disproportioned to the insult given. In the present case no physical injury was inflicted upon the plaintiff. His feelings were hurt; that is all. His sole grievance is that the company's official used unnecessary force in undertaking to discharge his duties. By persistent disregard of the company's regulations, it is clear that the plaintiff forfeited his right to longer remain in its waiting-room, and might very properly have been ejected therefrom. Being himself in the wrong, he is not in a position to justly complain that, instead of being forcibly ejected from the room, he was wrongfully treated with unnecessary harshness by the official in charge, and then permitted to remain therein, since the plaintiff by his own misconduct so exasperated that official as to unfit him for performing in an irreproachable and conservative manner the duties assigned to him ⁹³⁴ by his master. This being the view we take of the case, we shall not specifically deal with other points made in the motion for a new trial, touching the propriety of charging the jury as to the law with regard to the recovery of punitive damages, etc. In our opinion, the plaintiff was entitled to no damages at all.

Judgment reversed. By five justices.

The Reasonableness of Rules Prescribed by Railroad companies is a question of law for the court: South Florida R. R. Co. v. Rhodes, 25 Fla. 40, 23 Am. St. Rep. 506, 5 South. 633; *Barker v. Central Park etc. R. R. Co.*, 151 N. Y. 237, 56 Am. St. Rep. 626, 45 N. E. 550.

A Railroad Station-house is open to the traveling public, and any person desiring to go upon the cars has the right to go into such house at the proper time and remain there until the departure of the train: *Harris v. Stevens*, 51 Vt. 79, 73 Am. Dec. 337. And it is the duty of the company to keep the building in a comfortable, safe, and proper condition: *St. Louis etc. Ry. v. Wilson*, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; *Jordan v. New York etc. R. R. Co.*, 165 Mass. 546, 52 Am. St. Rep. 522, 43 N. E. 111; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587.

A Railroad Company is Liable to Passengers for ill-treatment and assaults from its employes, whether willful and malicious or in the scope of their employment or not: *Haver v. Central R. R. Co.*, 62 N. J. L. 282, 72 Am. St. Rep. 648, 41 Atl. 916; *Savannah etc. Ry. Co. v. Quo*, 103 Ga. 125, 68 Am. St. Rep. 85, 29 S. E. 607; *White v. Norfolk etc. R. R. Co.*, 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191. A conductor must not assault a passenger for abusive words, or in revenge or punishment, under any circumstances. The fault of a passenger, short of producing a necessity to strike in self-defense, will neither justify a conductor in striking, nor relieve the carrier from liability for his acts: *Birmingham Ry. etc. Co. v. Baird*, 150 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456; *Baltimore etc. R. R. Co. v. Barger*, 80 Md. 23, 45 Am. St. Rep. 319, 30 Atl. 560. But see *Georgia R. R. etc. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 35 S. E. 965; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

STATE v. RASMUSSEN.

[7 Idaho, 1, 59 Pac. 933.]

QUARANTINE of Animals.—A state has the power by law to prevent the introduction within its boundaries of diseased animals, and it is not an essential to the enforcement of such law that the fact of the existence of disease be primarily established. (p. 238.)

QUARANTINE of Animals—Constitutional Law.—A statute made simply and solely for the protection of the animals of the state from infection by the introduction into the state of diseased animals from a known infected district outside the state is a valid exercise of the police power, and does not in any way interfere with commerce between the states, or abridge the rights of citizens of other states within the state where the statute is enacted. (p. 239.)

Brown & Henderson, S. C. Winters and J. J. Guheen, for the appellant.

S. H. Hays, attorney general, for the state.

§ **HUSTON, C. J.** The appellant was convicted of a violation of the provisions of an act of the legislature of Idaho, and the proclamation of the governor issued under and in obedience to the command of said statutes, from which judgment this appeal is taken. The said act is as follows:

“Section 1. Whenever the governor of the state of Idaho has reason to believe that scab or any other infectious disease of ⁴ sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper.

Any person or corporation who, after publication of such proclamation, receives in charge any such sheep from any of the prohibited districts, and transports, conveys or drives the same to and within the limits of any of the counties of this state, is punishable by a fine not exceeding one thousand dollars, nor less than two hundred dollars, and is liable for all damages that may be sustained by any person by reason of the importation or transportation of such prohibited sheep.

"Sec. 2. Upon issuing such proclamation, the owners or persons in charge of any sheep being shipped into Idaho, against which quarantine has been declared, must forthwith notify the deputy inspector of the county into which such sheep first come, of such arrival, and such owner or persons in charge must not allow any sheep so quarantined to pass over or upon any public highway, or upon the ranges occupied by other sheep, or within five miles of any corral in which sheep are usually corraled until such sheep have first been inspected, and any person failing to comply with the provisions of this section is punishable as provided in section 1 of this act, and is liable for all damages sustained by any person by reason of the failure to comply with the provisions of this section."

On the twelfth day of April, 1899, the governor of Idaho, in compliance with the provisions of said act, issued the following proclamation:

"State of Idaho, Executive Office.

"Whereas, I have received statements from reliable wool-growers and stock-raisers of the state of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as 'scab' or 'scabbies' is epidemic among sheep in certain localities or districts, viz., in the county of Cache, state of Utah, the county of Box Elder, state of Utah, and the county of Elko, in the state of Nevada; and
"whereas, it is known that sheep from said districts are annually moved, driven, or imported into the state of Idaho, and, if so moved, would thereby spread infection and disease on the ranges and among the sheep of this state, which act would result in great disaster: Now, therefore, I, Frank Steuenberg, governor of the state of Idaho, by virtue of authority in me vested, and after due consultation with the state sheep inspector, do hereby prohibit the importation, driving, or moving into the state of Idaho of all sheep now being held, herded, or ranged within said infected district, viz., the county of Cache, in the state of Utah, the county of Box Elder, in the state of Utah, and the

county of Elko, in the state of Nevada, or which may hereafter be held, herded or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation. After the termination of said sixty days sheep can be moved into this state only upon compliance with all laws of the state of Idaho regarding the inspection and dipping of sheep. In witness whereof, I have hereunto set my hand, and caused to be affixed the great seal of the state. Done at Boise, the capital, this 12th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

“FRANK STEUENBERG. [Seal]

“By the governor:

“M. PATRIE,
“Secretary of State.”

While there are some sixteen assignments of error in this case, it is conceded by counsel for appellant that the important question involved is the constitutionality of the act of the legislature of Idaho under which the conviction was had. It is claimed that this case comes within the reasoning of this court in the case of *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456. In that case the defendant was convicted of a violation of an act of the legislature of Idaho passed in 1895, and amended in 1897, section 6 of which act provides as follows:

“Sec. 6. Any person, persons, company, corporation or association intending to bring, or cause to be brought from any other state or territory into any of the counties of the state of Idaho, any sheep, he or they must first notify the deputy sheep inspector of the district or county nearest to the point of entrance into this state that at a fixed date he will be within twenty miles from the state line at a designated point, with said sheep for inspection; and it shall be the duty of the deputy sheep inspector to examine such sheep within three days, and if pronounced sound, to immediately dip such sheep once, and then upon being tendered his compensation as hereinafter provided, issue a permit allowing such sheep to enter this state subject to such regulations as are enforced on resident sheep. But if such sheep are found scabby or infected with any contagious or infectious disease, then the deputy sheep inspector must dip said sheep twice with an interval of from eight to fifteen days between dipping and then issue a permit for said sheep to enter said state under the same regulations as heretofore provided; provided, however, that all sheep must enter said state within three days from the final dipping, otherwise permit

so issued shall be null and void. And any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, they shall be punished by a fine of not less than one hundred (\$100) dollars, nor more than three hundred (\$300) dollars, or by imprisonment in the county jail not less than two months nor more than six months, or by both such fine and imprisonment; provided, that any person, persons, company, corporation or association bringing or causing to be brought any sheep into any counties of this state in violation of the provisions of this act, shall be fined in addition to the penalty imposed in this section, five cents per head, for every sheep so brought into this state, which shall be a lien on said sheep; and it shall be the duty of the deputy sheep inspector to seize and hold such sheep by such means as he deems best, for a period of ten days, and if said sum is not paid within that period, to advertise and sell said sheep, or as many of the same as may be necessary to satisfy and pay such fine and costs."

And section 14 of the law of 1895 provides as follows:

"Sec. 14. It shall be unlawful for any person, persons, company, corporation or association, owning, controlling or managing any ferry-boat, toll-bridge, car, steamboat or other things⁷ used for transportation, to allow any sheep to be carried thereon, unless the party in charge of said sheep shall first produce a certificate from a deputy sheep inspector appointed under this act, that said sheep are free from scab, scabbies or other infectious or contagious disease. Any violation of this section shall be deemed a misdemeanor and punishable by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars."

A comparison of the act of 1897 with the act under question will, we think, disclose a greater difference than existed between the law of Missouri held by the supreme court of the United States to be invalid in *Railroad Co. v. Husen*, 95 U. S. 465, and the law of Kansas, the validity of which was sustained by the same court in *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488. The statute under consideration in the case of *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456, prohibited the introduction into this state, in any manner or form, or the transportation through the state in any way or by any means, of any sheep, until same had been inspected by a sheep inspector of Idaho, which inspection must be made twenty miles beyond the state line of Idaho; and all

sheep must be dipped at least once, and, if found infected, twice, before they were allowed to enter the state, and all this to be done by a sheep inspector of Idaho, twenty miles beyond the line of the state. The law of 1899 was intended as a quarantine law. It does not exclude all sheep, but only such as from the fact of their coming from an infected district, are liable to import disease. The statute of 1899, under which appellant was convicted, is simply a quarantine law—nothing more, nothing less. We do not understand that it is, or ever was, an essential to the enforcement of a quarantine that the fact of the existence of the disease in the subject of the quarantine should be primarily established. As we understand, it is a preventive measure. It will hardly be claimed, we apprehend, that the state has not the power to prevent, by legislative enactment, the introduction within its boundaries of diseased animals; and this is all that the act under consideration purports or is intended to accomplish.

⁸ The chief of the bureau of animal industry, in his report to the secretary of agriculture dated March 15, 1898, says: "In the United States, some sections have been overrun with sheep scab, and many persons engaged in the sheep industry have been forced to forsake it because of their losses from this disease. It is probable that, in its destruction of invested capital, sheep scab is second only to hog cholera, among our animal diseases. The large flocks of the plains and Rocky Mountain region, and the feeding stations farther east, have suffered severely, and are constantly sending diseased animals to the great stockyards of this country." The same officer states in his letter transmitting his report to the secretary of agriculture: "The disease known as 'scab' is one of the most serious drawbacks to the sheep industry, and results in enormous financial losses; yet, despite its insidious nature, its ease of transmission, its severe effects, and its prevalence in certain localities, it is a disease which yields readily to proper treatment." That the length of time of quarantine fixed by the Idaho statute is not excessive is, we think, shown by the rules laid down by the authority already cited: "1. Scabby sheep should never be driven upon a public road; 2. Sheds in which scabby sheep have been kept should be thoroughly cleaned, disinfected, and aired, and should be left unused for at least four weeks (better, two months) before clean sheep are placed in them; 3. Fields in which scabby sheep have been kept should stand vacant at least four weeks (better, six or eight) before being used for clean sheep; 4. A

drenching rain will frequently serve to disinfect a pasture, but it is well to whitewash the posts against which scabby sheep have rubbed. Even after observing the precautions here given, it is not possible to absolutely guarantee that there will be no reinfection, but the probabilities are against it": Report of Chief of Bureau of Animal Industry, 1898. With this authoritative statement before them, the legislature of Idaho enacted the law under consideration. That, under the conditions established and recognized, some legislation was necessary for the effective prevention of the spread of this disease among the sheep of this state must be conceded; and we are clearly of the opinion that that adopted by the legislature was the most effective, ⁹ and the least objectionable, that could have been adopted. Counsel for appellant speaks somewhat contemptuously of these reports of the bureau of animal industry to the secretary of agriculture of the United States, but we notice that they are cited as authority by the supreme court of the United States in *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. Rep. 277. The supreme court, in the last-mentioned case, in drawing the distinction between it and the case of *Railroad Co. v. Husen*, 95 U. S. 465, says: "The decision in that case [*Railroad Co. v. Husen*] rested upon the ground that no discrimination was made by the law of Missouri, in the transportation forbidden between sound cattle and diseased, and this circumstance is prominently put forth in the opinion." The same distinction appears between the Idaho law of 1895 and 1897 and the law of 1899. The law of 1895 and 1897 prohibited the bringing into the state of any sheep until the same had been inspected and treated by an Idaho sheep inspector twenty miles beyond the state line. The law of 1899, and the proclamation of the governor thereunder, quarantine sheep coming from an infected district or locality, before permitting them to be driven into this state. Our legislature, in rightful recognition of the large and constantly increasing importance of the sheep industry, as one of the most important elements of the wealth and resources of the state, have enacted most stringent and comprehensive laws for the protection of those animals from disease. But what avails the enactment or the enforcement of laws for the protection of sheep within the state, if we are to be constantly subject to an invasion of sheep from the infected districts of adjoining states or counties? And we do not think that a law made simply and solely for the protection of the sheep of this state from infection by the introduction into the state of sheep

from a known infected district can in any way be said to interfere with commerce between the states, or abridge the rights of citizens of other states within this state. The law only requires persons who desire to drive sheep into this state from known infected districts to be subject to the same rules and regulations for the prevention and cure of disease among their sheep so sought to be driven into this state as is required of our own citizens. The supreme ¹⁰ court of the United States, in *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, which is, we believe, the latest expression of that court upon this question—says: “Neither corporations nor individuals are entitled, by force alone of the constitution of the United States, and without liability for injuries resulting therefrom to others, to bring into one state, from another state, cattle liable to import or capable of communicating disease to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the constitution. This court, while sustaining the power of the Congress to regulate commerce among the states, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national constitution, nor come in conflict with the acts of Congress passed in pursuance of that instrument. Although the powers of a state must, in their exercise, give way to a power exerted by Congress under the constitution, it has never been adjudged that that instrument by its own force gives anyone the right to introduce into a state, against its will, cattle so affected with disease that their presence in the state will be dangerous to domestic cattle.” We can see but little difference in principle between the case of *Railway Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, and the case under consideration. The Kansas statute under consideration in that case made any person or persons bringing into that state any cattle liable or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of that state, liable for all damages that might be sustained by reason of the communication of said disease: “Proof that the cattle which such person or persons are charged with shipping, driving or keeping, or which are claimed to have communicated the said disease, were brought into this state from south of the thirty-seventh parallel of north latitude, shall be taken as prima facie evidence that such cattle were between the first day of February and the first day of December

of the year in which the offense was committed capable of communicating and liable to import Texas, splenic or Spanish fever within the meaning ¹¹ of this act, and that the owner or owners, person or persons in charge of such cattle had full knowledge and notice thereof." And this statute was upheld by the United States supreme court against a contention predicated upon the same lines contended for by the appellant in this case, to wit, the limit of the power of the state in the matter of public regulations.

The contention of appellant that it was not shown that any of the sheep driven by him into this state were diseased, or that he was not permitted, although ready to prove that none of said sheep were diseased, cannot be entertained. The appellant himself testified that he had the sheep in Box Elder county, Utah, which is designated in the proclamation of the governor as one of the infected districts, and against which quarantine had been declared for the period of twenty-five days. The fact that these sheep came directly from an infected district was sufficient to establish their capability and liability to communicate disease. The authorities upon the disease known as "sheep scab" say that it may be communicated by contact of one sheep with another, or indirectly from tags of wool, or from fences, posts, etc., against which scabby sheep have rubbed, or from the places where the sheep have been "bedded down": See Report of Chief of Bureau of Animal Industry for 1898. What protection, then, have the sheep-growers of Idaho, without the aid of just such preventive laws as that under consideration?

We have examined and considered the various assignments of error set out in appellant's brief, and we do not think that any of them present reversible error. Appellant claims that the venue is not properly laid. We do not think this contention can obtain. The bringing into any county of the state of sheep from the prescribed districts is an offense, and prosecution therefor may be instituted in any county where the sheep are found. We do not think that the act delegates to the governor legislative power. It simply requires him to act when he ascertains that certain conditions exist. This is not a delegation of legislative power, as we understand it. Having ascertained, through entirely proper and legitimate methods, the existence of the exigency which, under the law, required ¹² him to act, he did so. He could not have done otherwise without being obnoxious to the charge of dereliction in official

duty. The claim that the law discriminates against the citizens of Utah is entirely unsupported. We think most, if not all, of the other questions raised in the assignment of errors have been disposed of in this opinion. The judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

REGULATIONS WHICH THE STATE MAY ENFORCE CONCERNING THE QUARANTINE OF ANIMALS.*

- I. Constitutionality of Quarantine Statutes.
- II. United States and State Statutes.
- III. Sanitary Boards and Commissions.
- IV. Construction of Statutes.
- V. Jurisdiction.
- VI. Expense of Quarantine.

I. Constitutionality of Quarantine Statutes.

In the great cattle and sheep-raising states of this country statutes have been enacted whose object is to protect from contagious and infectious diseases the animals domiciled therein, and with that end in view they restrict or prohibit the importation of cattle from other localities, likely to impart disease. These statutes have been before the courts on numerous occasions, and the question of their constitutionality passed upon, the chief objection urged against them being that they interfere with that clause of the constitution of the United States empowering Congress to regulate commerce between the different states. The statutes themselves differ as to their provisions, and must on that account be separately examined.

In *Reid v. People*, 29 Colo. 533, 93 Am. St. Rep. 69, 68 Pac. 228, affirmed in 187 U. S. 137, 23 Sup. Ct. Rep. 92, it is said: "Unquestionably, quarantine and inspection laws of a state having for their object the health of its citizens, or the prevention or suppression of disease among its domestic livestock, is within the province of state legislation. It comes within the scope of the general police power which the states have never surrendered. While it is true that, under the guise of exerting its police power, the state may not go beyond what is necessary for the protection of its citizens and their property, or to such length as to interfere with, or obstruct, legislation of Congress calculated to regulate interstate commerce, or infringe upon any of the sovereign powers intrusted to Congress, yet, if it keeps within the scope of its authority and prescribes regulations which are reasonably necessary to further the legitimate object aimed at, its acts may be upheld." The statute there under

***REFERENCES TO MONOGRAPHIC NOTES.**

Enactment of quarantine laws: 27 Am. St. Rep. 567.

Quarantine and health laws and regulations: 47 Am. St. Rep. 583.

consideration provided that for a certain period of each year it should be unlawful to bring into Colorado cattle from south of the thirty-sixth degree parallel of north latitude, unless they had been held, for at least ninety days prior to their importation, at some place north of that parallel, or unless a certificate from the state sanitary board should be procured, the owner to pay the expense of inspection. This the court held not in conflict either with the commerce clause of the United States constitution, nor with the section guaranteeing equal privileges to the citizens of the several states; nor is the inspection fee an impost, tax or duty.

How far a right of a shipper of cattle is impaired is discussed in the same case before the United States supreme court—*Reid v. People*, 187 U. S. 137, 23 Sup. Ct. Rep. 92—Justice Harlan, in the course of the opinion, saying: “Now, it is said that the defendant has a right under the constitution of the United States to ship livestock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a state, against its will, livestock affected by a contagious, infectious or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the constitution of the United States.”

An early Illinois statute made it unlawful for anyone to bring into that state, or own, or have in possession, any Texas or Cherokee cattle. The court held in *Yeazel v. Alexander*, 58 Ill. 254, that this was a valid exercise of police power, and not unconstitutional, and this case was followed in *Stevens v. Brown*, 58 Ill. 289; *Somerville v. Marks*, 58 Ill. 371; *Chicago etc. R. Co. v. Gasaway*, 71 Ill. 570. That line of cases was, however, overruled in *Sukzenstein v. Mavis*, 91 Ill. 391; *Chicago etc. R. Co. v. Erickson*, 91 Ill. 615, 33 Am. Rep. 70, following *Hannibal etc. Ry. Co. v. Husen*, 95 U. S. 465.

Yeazel v. Alexander, 58 Ill. 254, was also at one time followed in Missouri, the statute in question prohibiting the importation, during certain seasons of all Texas or Mexican cattle: *Wilson v. Kansas City etc. R. Co.*, 60 Mo. 184; *Husen v. Hannibal etc. R. Co.*, 60 Mo. 226; *Dimond v. Kansas City etc. R. Co.*, 60 Mo. 393; *Mercer v. Kansas City etc. R. Co.*, 60 Mo. 397; *Kenney v. Hannibal etc. R. Co.*, 62 Mo. 476. These cases were also overruled, the supreme court of the United States declaring such legislation unconstitutional in *Hannibal etc. R. Co. v. Husen*, 95 U. S. 465, which was followed by the Missouri court: *Gilmore v. Hannibal etc. R. Co.*, 67 Mo. 323; *Urton v. Sherlock*, 75 Mo. 247.

Hannibal etc. R. Co. v. Husen, 95 U. S. 465, is the leading case on this subject. In the opinion of the court it is said: “The stat-

ute, approved January 23, 1872, by its first section, enacted as follows: 'No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain in any county in this state, between the first day of March and the first day of November in each year, by any person or persons whatever.' A later section is in these words: 'If any person or persons shall bring into this state any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle.' It is noticeable that the statute interposes a direct prohibition against the introduction into the state of Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that 'when such cattle shall come across the line of the state, loaded upon a railroad car or steamboat, and shall pass through the state without being unloaded, such shall not be construed as prohibited by the act, but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be prima facie evidence that such disease has been communicated by such transportation.' This proviso imposes burdens and liabilities for transportation through the state, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the state, with the single exception mentioned.

"The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the state a large and common subject of commerce, and prohibits its crossing the state line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the state without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the state is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one state and that of citizens of other states."

The court then discussed the question of police power, holding that whatever might be its nature, it could not be exercised over a subject confided by the constitution exclusively to Congress; and continued: "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle, be-

tween March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure.

"In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained: *Yeazel v. Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of the state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution."

In *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. Rep. 277, the validity of an Iowa statute was involved, making a person having in his possession within that state any Texas cattle, which had not been wintered north of a certain boundary, liable for any damages which might accrue from allowing them to run at large and thus spread Texas fever. The court held that such enactment did not conflict either with the clause relative to the regulation of commerce, or with that relative to the privileges and immunities of citizens of the several states, and that the case of *Railroad Co. v. Husen*, 95 U. S. 465, did not have any bearing upon the question presented, the court saying that there no attempt was made to show that all Texas and Mexican cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected as to render it impossible to separate the healthy from the diseased. And they added that had such proof been given, a different question, would have been presented for the consideration of the court.

A Kansas statute made any person who should ship into the state any cattle capable of communicating Texas fever, liable to anyone injured thereby, and provided that proof that such cattle came from south of a certain parallel of latitude should be *prima facie* evidence that they were, between prohibited dates, capable of communicating that disease; but that it should not apply if they were shown by a

certificate, as set forth therein, to have wintered north of a fixed parallel of latitude. It was held valid: *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488. Here, also, the case of *Railroad Co. v. Husen*, 95 U. S. 465, was relied on but it was distinguished on the ground that there the statute went beyond the necessities of the case, it excluding all Texas cattle, whether free from disease or not, or whether liable to injure inhabitants of the state or not, the court saying: "No such criticism can be made of the statute of Kansas. It does not prohibit the bringing into the state of all Texas cattle. It does not in any true sense prohibit or burden any commerce among the states specifically authorized by Congress, but, for purpose of self-protection only and in the exercise of its inherent power to protect the property of its people, declared that any corporation or person bringing into the state or driving into or through any county of the state, cattle liable to impart or capable of communicating Texas splenic or Spanish fever to domestic cattle, should be responsible in damages to anyone to whose cattle that disease was communicated by the cattle so brought into the state."

A state may enact a law prohibiting the importation of cattle diseased with the Texas fever, and such a law is valid and does not fall within the *Husen* case: *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951.

In *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456, the statute under construction provided that before sheep could be brought into that state they should be dipped twenty miles from the state line, if healthy, once, if infected, twice. This was held to interfere with interstate commerce, as no sheep could be shipped over any transportation lines in Idaho without first unloading the sheep, and having a sheep inspector inspect and dip them. It was also held unconstitutional as discriminating against outside sheep, by imposing more stringent regulations on the owners of such sheep, as requiring them to be dipped during the winter months was practically a prohibition against bringing any sheep into the state during that time.

The power to prevent the importation of diseased cattle into a state, and the power to prevent the transportation through a state, rest upon different principles. The former is allowed, as a valid exercise of police power, the latter is forbidden as interfering with interstate commerce. The state may, however, prescribe the manner and mode of transporting cattle through its territory, in order to prevent the spread of disease and contagion: *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, 28 S. W. 756; *Selvege v. St. Louis etc. R. Co.*, 135 Mo. 163, 36 S. W. 652.

A statute of the United States providing that no person shall drive on foot or transport in private conveyance from one state to another any livestock, knowing them to be affected with a contagious disease

is within the power of Congress to regulate interstate commerce: *United States v. Slater*, 123 Fed. 115.

II. United States and State Statutes.

The transportation of livestock from one state to another, being a branch of interstate commerce, is controlled by such enactments as Congress may see fit to make, and these will render nugatory all state statutes dealing with the same subject matter, whether formally abrogated or not. But where Congress has not legislated upon the whole subject matter, it is competent for a state to pass laws covering such matter: *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, affirming 29 Colo. 333, 95 Am. St. Rep. 69, 68 Pac. 228. Where there is no conflict, the different statutes and regulations are intended to operate concurrently: *Missouri etc. Ry. Co. v. Haber*, 56 Kan. 694, 44 Pac. 632, affirmed, 169 U. S. 613, 18 Sup. Ct. Rep. 488. After cattle have become domiciled within a state, their management is governed by its laws, and not by act of Congress: *Mullen v. Western Union Beef Co.*, 9 Colo. App. 497, 49 Pac. 425.

Where an act of Congress provided that the Department of Agriculture should prepare regulations for suppressing disease among cattle, that the co-operation of the different states should be invited in attaining that object, and empowering the secretary of agriculture to make certain expenditures for stamping out the disease, upon any state accepting his plans, it was held that these rules and regulations would be ineffective unless a state interested should co-operate with him in their enforcement: *Mullen v. Western Union Beef Co.*, 9 Colo. App. 497, 49 Pac. 425; and according to that case the Secretary cannot make rules, upon compliance with which cattle may be removed from the territory in which the contagion exists to other parts of the United States, where the statute under which he acts merely prohibits the transportation of infected cattle, known to be so, making a violation thereof a misdemeanor, and directing the secretary to notify transportation officials doing business in an infected locality of the existence of the contagion. A mere notice of the existence of the disease, and a statement that it is a violation of the law to receive cattle infected thereby, is sufficient, and the order of the Department of Agriculture need not specify any particular district or declare within what specific territory a quarantine has been established: *United States v. Slater*, 123 Fed. 115.

An act of Congress relating to the exportation of diseased cattle and suppression of diseases refers only to interstate shipments and not to those made between different points in the same state: *Davis v. Texas etc. Ry. Co.*, 12 Tex. Civ. App. 427, 54 S. W. 144.

III. Sanitary Boards and Commissions.

Officers or boards have been appointed in the different states for the purpose of protecting their domestic cattle from the ravages of

disease. In Texas the board is known as the "State Livestock Sanitary Commission." Such commission may forbid the importation of cattle from other localities in which disease has broken out, and its regulations do not conflict with the interstate commerce clause: *St. Louis etc. Ry. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627. Where the statute referring to the movement of livestock provided that the quarantine regulations of the commission should not apply between certain times of each year to the moving of livestock within the state limits, the commission had no authority to prohibit the driving of such stock on a date falling within the times above mentioned, and doing so constituted no offense: *Roberson v. State*, 38 Tex. Cr. Rep. 507, 43 S. W. 989. By statute in Texas the quarantine line fixed by the livestock sanitary commission against Texas fever, must conform with the federal quarantine line established by the Department of Agriculture: *Fort Worth etc. R. Co. v. Masterson*, 95 Tex. 262, 66 S. W. 833, and if it does not it is void: *Trent v. State* (Tex. Cr. App.), 75 S. W. 857.

The livestock sanitary commission has the powers of an inferior tribunal, which, being summary and not according to the course of the common law, must be strictly observed. So where an act provides that a sheriff can seize and quarantine cattle on a "complaint" that such cattle are liable to impart Texas fever, a communication that the sanitary commission requests him to quarantine certain cattle is not a complaint, and he cannot justify under it when sued in replevin for the cattle: *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641. Possession by a sheriff of cattle under an order of the sanitary commission is prima facie a sufficient justification to him in taking and holding them: *Hardwick v. Brookover*, 48 Kan. 609, 30 Pac. 21. The proceedings had upon a complaint to the sheriff are not, however, conclusive with respect to the animals, or upon their owners, who may show in replevin or trover that their cattle do not fall within the provisions of the statute: *Verner v. Bosworth*, 28 Kan. 670; *Wilcox v. Johnson*, 54 Kan. 655, 9 Pac. 670.

In order for the report and rules of a board of livestock commissioners to constitute a justification in a replevin suit to recover cattle seized thereunder, such rules and proclamation must be shown to have been authorized by law and necessary: *Pierce v. Dillingham*, 203 Ill. 148, 67 N. E. 846, affirming 96 Ill. App. 300. In that case a statute empowered the board to request the governor to issue a proclamation against the importation of livestock when a contagious disease had become epidemic among livestock in other states, or their condition made them liable to convey such disease. This was held not to be complied with where the request to the governor stated that a certain disease "prevailed to a greater or less extent" among the dairy and breeding herds of all the states and territories, and that cattle affected thereby were dangerous and liable to communicate disease.

That an officer dipping sheep under a gubernatorial proclamation does not act in a quasi judicial capacity, but in a ministerial, and hence liable for negligence: See *Bair v. Struck* (Mont.), 74 Pac. 69.

IV. Construction of Statutes.

Where a statute provided that no Texas cattle should be driven through the state that might have come in between the first days of March and December of each year, it was meant to prohibit only such as should come into the state between those dates, and was not a prohibition against driving through the state any Texas cattle during that time, regardless of when they were brought into the state: *Kansas Pac. Ry. Co. v. McCoy*, 8 Kan. 538. And where a statute forbidding the importation of such cattle, gives a right of action for all damage resulting in any manner therefrom, it is not limited to any particular kind of disease, nor to any mode by which it may be communicated: *Sangamon etc. Co. v. Young*, 77 Ill. 197. In *State v. Turner*, 63 Kan. 233, 65 Pac. 217, a statute made it a misdemeanor to drive into the state any cattle liable to impart Texas fever, and made the fact that the cattle were brought in from south of a certain parallel of latitude, between the first of February and December of each year prima facie evidence that they were capable of communicating the fever, and that the owner had full knowledge thereof. The defendant contended that, as the information charged a driving into the state, knowing that they were capable of communicating Texas fever, the state should be confined to proving actual knowledge on his part. The court, however, held that as the statute provided that driving was prima facie evidence of knowledge, the admission of that fact in evidence was correct as proving it.

V. Jurisdiction.

The legislature enacting a statute for the protection of livestock may, within the limits of the constitution, determine the forum which shall try the cases arising thereunder; and if brought in any other courts than those prescribed, there is a want of jurisdiction: *Evans v. Adams*, 21 Kan. 119.

VI. Expense of Quarantine.

Where a statute provides that when any animals are quarantined upon the premises of the owner, he shall pay the expense, and when taken from such premises, it shall be paid by the city, if they are quarantined on his premises and subsequently shipped away, by order of the authorities, he is not entitled to be reimbursed, the reimbursement applying only to animals isolated upon premises other than those of the owner when the order of isolation was made: *Kenneson v. Inhabitants of Framingham*, 168 Mass. 236, 46 N. E. 704.

WILLIAMS v. OLDEN.

[7 Idaho, 146, 61 Pac. 517.]

ATTACHMENT—Levy—Creation of Lien.—The levy of a writ of attachment must be in substantial compliance with the provisions of the statute, to create a lien. (p. 251.)

ATTACHMENT—Notice of Levy—Creation of Lien.—If the statute requires copies of a writ of attachment, a description of the property and notice of the levy to be served on the occupant of the land attached, if there is one, and if none, the posting of such copies in a conspicuous place, on the land, it is not a sufficient compliance with the statute to create a lien, to serve such copies on the owner who is not an occupant of the land. (p. 251.)

ATTACHMENT—Lien.—Entry of Judgment will not cure defects in the levy of a writ of attachment, and make what is no lien a valid one. (p. 252.)

J. L. Niday, for the appellant.

B. F. Olden, for the respondent.

147 SULLIVAN, J. This is an action to quiet title, and was submitted to the trial court on stipulated facts, and judgment was entered in favor of the defendant, who is the respondent here.

The only question submitted for decision is whether a valid levy of a writ of attachment can be made on land, not containing an occupant, by filing with the recorder of the county in which the land is situated a copy of the writ, together with a **148** description of the land attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with the defendant, who does not reside on the land. Section 4307 of the Revised Statutes provides, inter alia, as follows: "The sheriff to whom the writ is directed, and delivered, must execute the same without delay, and if the undertaking mentioned in section 4305 be not given, as follows: 1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, if not, then by posting the same in a conspicuous place on the property attached." It will be observed that said section provides the specific acts that must be done and performed by the officer in levying the writ, and among other acts it provides that the

officer must leave a copy of the writ, description, and notice with an occupant of the property, if there be one; if not, then he must post a copy of such writ, description, and notice in a conspicuous place on the property attached. A substantial compliance with the said provisions is necessary to make a valid levy, and the personal service of a copy of the writ, description, and notice on the defendant in the action, who is not an occupant of the land sought to be attached, is not equivalent to the posting of such copies in a conspicuous place on the land. Had the legislature intended that personal service would satisfy the requirements of that provision of the law, it certainly would have used terms clearly expressing its intention. In *Watt v. Wright*, 66 Cal. 202, 5 Pac. 96 (which was a case involving substantially the same question as the one at bar), the supreme court of California said: "The failure of the officer to do these things, as required by law, was fatal to the validity of the levy by attachment"; and that the acts done by the officer were insufficient to create a lien upon the property: See, also, *Steinfeld v. Menager* (Ariz.), 53 Pac. 495. While some of the California cases held that a strict compliance with the provisions of the statute is required to create a lien, this court does ¹⁴⁹ not go to that extent. We hold that a substantial compliance is all our statute requires in said matter. In *First Nat. Bank v. Sonnelitner*, 6 Idaho, 21, 51 Pac. 993, this court held in the levy of a writ of an attachment that, if the acts required by the statute are not performed by the officer, there is no levy of the writ. Respondent cites in support of his contention *First Nat. Bank v. Lieuallen*, 6 Idaho, 431, 39 Pac. 1108, decided by this court. While the statement in this case may be obscure and misleading as to the levy of the attachment and the notice filed with the recorder being sufficient to give notice, still the only question raised in that case was as to the contents of the notice. The record in that case shows that copies of the writ, description of the land, and notice that the land was attached were posted in a conspicuous place on the land and the court did not intend to convey the idea that a filing of such copies with the county recorder was all that was required by the law to make a valid levy of the writ. The notice itself was attacked on the ground that it was not as full and complete as the law required. No question was raised as to the performance of the acts required by the officer in the levy of the writ.

It is also contended by respondent that, as the defendant failed to appear and move to discharge said writ, he waived all

defects in the levy thereof, and that the entry of the judgment cured any and all defects, if any there were, in the levy. We cannot agree with that contention. While the entry of judgment may cure some defects in the issuance of the writ, such entry will not cure defects in a levy of the writ, and make what was no lien a valid one. No lien is created unless the service of the writ is made in substantial compliance with the requirements of the statutes. The judgment is reversed, and the cause remanded for further proceedings in conformity with the views expressed in this opinion. Costs are awarded to appellant.

Huston, C. J., and Quarles, J., concur.

The Essentials of a Valid Attachment of real property are discussed in *Baker v. Aultman*, 107 Ga. 339, 73 Am. St. Rep. 132, 33 S. E. 423; *Schoonover v. Osborne*, 111 Iowa, 140, 82 Am. St. Rep. 489, 82 N. W. 505; *Bank of Colfax v. Richardson*, 54 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. As a rule the statutory provisions for levying an attachment, must be observed strictly, and a departure therefrom invalidates the levy: *Ames v. Parrott*, 61 Neb. 847, 87 Am. St. Rep. 536, 86 N. W. 503; *Pullman etc. Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 South. 697; note to *Miller v. White*, 76 Am. St. Rep. 800. For irregularities and defects avoiding attachments, see the monographic note to *Fridenberg v. Pierson*, 79 Am. Dec. 164-174. Every intendment of the law is in favor of the sufficiency of an attachment, where the writ issues from a court of superior or general jurisdiction, unless the record affirmatively shows want of jurisdiction: *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 759. On judgments depending for their validity upon an attachment of property, see the monographic note to *Miller v. White*, 76 Am. St. Rep. 800-805.

STATE v. ALCORN.

[7 Idaho, 599, 64 Pac. 1014.]

EVIDENCE.—Answers to Hypothetical Questions, based upon facts which the evidence then before the jury tends to prove, are properly admitted in evidence. (p. 256.)

MURDER by Abortion.—On a prosecution for murder resulting from an operation to produce an abortion, the pregnancy of the deceased must be proved beyond a reasonable doubt, but need not be demonstrated to an absolute certainty. (p. 256.)

ABORTION.—Under Idaho Statutes abortion may be committed prior to the quickening of the foetus. (p. 257.)

CORPUS DELICTI may be Proved by Declarations and Circumstances and the order in which the evidence proving the material facts is introduced is not material. (p. 257.)

MURDER—Manslaughter.—Under an indictment for murder a verdict of manslaughter may be sustained. (p. 258.)

MURDER by Abortion—Evidence Res Gestae.—On a prosecution for murder resulting from an operation to produce an abortion, the declaration of the deceased, made at the time she was introduced to the accused, to the effect that she was pregnant, and which had direct reference to the contemplated transaction between the parties, is admissible in evidence as a part of the res gestae. (p. 261.)

MURDER by Abortion.—An unnatural or criminal abortion procured upon a pregnant woman, is, when death results, murder in the second degree, and not manslaughter. (p. 262.)

CRIMINAL LAW.—An Erroneous Instruction Beneficial to, and not prejudicial of, the rights of the accused, is not ground for reversal of the judgment. (p. 262.)

CRIMINAL LAW—Circumstantial Evidence.—If evidence depended upon for a conviction is circumstantial, every fact necessary to connect the defendant with the commission of the alleged crime must be established to the satisfaction of the jury beyond a reasonable doubt, but this does not impose upon the prosecution the burden of proving every collateral or corroborative fact or circumstance in the case, beyond a reasonable doubt. (p. 262.)

E. McBee, for the appellant.

F. Martin, attorney general, for the state.

602 QUARLES, C. J. The appellant was tried upon an indictment charging him with the murder of one Cora A. Burke, resulting from a criminal operation performed by appellant for the purpose of bringing about an abortion; was convicted by a jury of manslaughter, and adjudged to serve a term of seven years in the state penitentiary; moved for a new trial, which was denied; and appealed, both from the judgment and from the order denying him a new trial. The record is quite voluminous, but we have given to the same our careful attention, and from the record we summarize the facts, as shown by the evidence at the trial, as follows:

603 The deceased was twenty years old, and had been married, but her husband had been dead about five months. She had one child, a son about four years old. She lived in her own home, her father and mother living with her. She was in apparent good health up to June 21, 1899. Some time in May, 1899, Mrs. Martha Johnson, at the request of the deceased, introduced the deceased to the appellant, who had been practicing medicine for a short time in the town of Harrison, in said Kootenai county. Before being introduced to appellant, the deceased inquired of Mrs. Johnson as to the appellant, asking if he was a good doctor, and stating at the time that she was pregnant, and had been about six weeks. Mrs. Johnson in connec-

tion with one E. J. Abbey, was conducting a restaurant and boarding-house, and defendant was boarding with them. Deceased visited the appellant the two days following her introduction to the appellant. Mr. Abbey testified that while in an adjoining room to that occupied by the appellant, and while deceased was in appellant's room, he heard deceased say: "The instrument that you are using on me hurts me." On the night of Tuesday, June 21, 1899, appellant requested one J. T. Rundell to assist him, and said Rundell did assist appellant to carry a table, about five feet in length, into appellant's office, the same being the back room to a drugstore in the town of Harrison. Rundell's curiosity being excited he asked appellant if he was going to "dissect a stiff," and appellant said, "No; that he was going to perform an operation on a party across the river." About 10 o'clock, Rundell, who was, through curiosity, as he says, on the lookout, saw deceased enter the drugstore and go into the office of appellant. Rundell then went to the rear. There was a small window in a door in the rear end of appellant's office, on the inside of which a blind or curtain had been drawn in such a manner that it did not hang perpendicular, leaving a small corner of the window uncovered, through which the witness Rundell looked and saw what transpired. Rundell details at length what he saw. He saw appellant standing by deceased, who was sitting in a chair, supporting the head of deceased with one hand, in which he held a small phial containing a dark liquid, and holding to the nostrils of deceased a cloth with the other hand. Witness stated that this continued until deceased appeared to be asleep, whereupon appellant took in her in his arms and laid her upon the table, which witness had previously assisted to carry into the office, laid her on her back, her lower limbs spread apart, removed her drawers, rolled up her skirts, placed a speculum in her vagina, and examined her organs, and then took a probe about a foot long and introduced it into her person through the speculum, which caused some blood to flow, which appellant removed with a cloth. Witness testified that the operation consumed about one and a half hours; that appellant used the cloth, which he supposed to be saturated with chloroform, by holding the same to the nostrils of deceased the second time while she was on the table. The feet of deceased were toward the witness. Deceased then revived, and with the assistance of appellant rearranged her clothing and went away in the direction of home. The next day, about 4 o'clock P. M., appellant was called to see deceased,

who was suffering greatly, made a digital examination of her uterus, and found the same inflamed and bleeding to some extent. Appellant prescribed ergot, directing that she be given one-half of a teaspoonful each half hour three times, when it should be left off. He afterward directed that it be given in same quantity every hour until otherwise directed, and it was so given for eighteen hours. In response to a question by the mother of deceased, appellant said that the womb of the deceased was badly inflamed, whereupon her mother asked: "Doctor, what is the cause of that?" To which appellant answered: "She caught a bad cold. She does not flow enough when she has her monthlies. I will give her something to make her flow." This was Wednesday afternoon. Appellant visited deceased five times all told, the last time on Friday afternoon about two hours before she died, and while her feet and hands were cold with approaching dissolution, her fingers blue, and her lips purple. He told her mother that she was getting along all right and would soon be up, immediately after which he boarded the train and went into the state of Washington, returning about 10 o'clock the following Sunday morning. The next day (Monday) he left the state and went to Montana, ~~605~~ where he was arrested and brought back to Kootenai county, reaching there July 5th. Appellant returned without a requisition. During the illness of the deceased much blood and considerable clotted blood passed from her, saturating the bedding under her. Mrs. Knight, a witness for the prosecution, testified that she was at the house of the deceased during her illness and after her death, and helped to dress her remains. Using the language of the witness: "I helped dress her after she was dead. Her clothing and bedclothing were saturated with blood. A quilt was doubled up under her four thicknesses, and it was clear through the quilt. It was clots of blood. I observed an odor in connection with it. There was too great a quantity to have come from the ordinary menstruation. Much greater in quantity." About 6 o'clock P. M. on Tuesday, June 21, 1899, William Ketchum called appellant to visit his (Ketchum's) wife, and appellant then said: "Well, I don't know. I am expecting a miscarriage here any minute. I can go over there and come back, if it does not make any difference to them." Appellant did go with said Ketchum. Deceased had been to see appellant that afternoon, and he had directed her to come to his office that night. F. H. Bradbury, sheriff of Kootenai county, testified at the trial as follows con-

cerning an admission made by the appellant: "He told me that he never had anything to do with this girl, Cora Burke; that he began in the daytime an operation on a man for stricture, and did not complete it; and that he took him in the back room of the drugstore and completed the operation in the evening. He gave this statement after I had warned him not to make any statement to me. This was on the train between here and Missoula." The appellant testified in his own behalf, and to some extent corroborated that of the witness Rundell. His defense is that the deceased had endeavored to relieve herself by using a hair dart, which, while inserted in her uterus, pierced the wall thereof and broke off, leaving a piece of the same about one and a half inches in length in the uterus; that the operation that Rundell described consisted of his efforts to remove this piece of hair dart; that he did remove the piece of hair dart by using a speculum and piston syringe, having attached ~~to~~ to the syringe a snare. He also testified that he was introduced to deceased by Mrs. Johnson.

A number of expert witnesses were introduced, to whom two sets of hypothetical questions were propounded—the one being based upon the idea that the speculum and probe were used on deceased to procure an abortion; the other, to remove a piece of hair dart from her uterus—in reply to which questions the expert witnesses gave speculative or professional opinions as to the cause of death. The learned doctors all agreed that the deceased died of septic or blood poisoning; and the evidence also shows that ergot, when given to a pregnant woman, has the tendency to contract the uterus and throw out the foetus. It is earnestly contended by the appellant that the hypothetical opinion asked on the part of the prosecution was not based upon the evidence introduced. A careful study of the record convinces us that the action of the trial court in overruling the objection interposed by the defense to this question upon said ground was correct. Said hypothetical question was based upon facts which the evidence then before the jury tended to prove.

It is also contended by appellant that the evidence showing the facts detailed above was improperly admitted, for the reason that the corpus delicti had not first been established. We are somewhat in doubt as to the real meaning of counsel in making this contention. Whether he means that the state should first prove the death of the deceased and the cause thereof, or the intent of appellant in making the operation described by the witness Rundell, or both, we are at some loss to determine.

Certain portions of the argument of the counsel for appellant appear to be based upon the idea that, before the conviction in question can be sustained, the prosecution must first prove beyond all question that the deceased was pregnant, or, in other words, that this fact must be demonstrated to an absolute certainty, before the prosecution could proceed to introduce evidence tending to connect the appellant with the alleged crime. At the common law an abortion could not be committed prior to the quickening of the foetus. This is not the case under our statutes. The pregnancy of the deceased in the case at bar can be shown, and was shown to the satisfaction of the jury, by ~~her~~ declarations and by circumstances. She declared at the time she was introduced to the appellant, from whom she was evidently seeking relief, that she was pregnant. Appellant declared on the evening that he operated upon the body of the deceased with speculum and probe that he was expecting a miscarriage at any minute. Deceased was in good health, as was testified by her mother, up to the day of this operation. She was young, had been a widow a short time (five months), and believed that she had been pregnant a little over two months, and was engaged to be married. The very use of the probe by the appellant is a corroborating circumstance. His declarations to the sheriff, purely voluntary, that he had not touched the girl, Cora Burke, and that the operation that he performed was upon a man for stricture, and his actions in leaving the state, all tend to show guilty knowledge upon his part, and were inconsistent with the idea of the innocent exercise by him of professional skill. It is true that there was a conflict in the testimony to some extent. Two theories were advanced—that by the prosecution to the effect that the operation, proven by an eye-witness and corroborated by many facts and circumstances, the unnatural flow of clotted blood from the generative organs of deceased, and the acts and declarations of appellant, tended to establish an attempt on the part of the appellant to bring about an abortion upon the person of the deceased; while the other theory was based solely upon the idea that the operation was performed for the purpose of removing a portion of a hair dart from the uterus of the deceased. We think the verdict of the jury was supported by the evidence, and that the corpus delicti was sufficiently proven, both as to the body of the offense and as to the intent of appellant in committing it. A reversal cannot be had because, forsooth, the elements of the crime were not proven in a certain order. Before a verdict of guilty can be

sustained, the evidence must be sufficient to establish the *corpus delicti*—the body of the offense—and the intent with which it was committed beyond a reasonable doubt. The intent of the accused is to be gathered from his acts, considered in connection with, and in the light of, the surrounding conditions and circumstances. We are convinced that the evidence before the ⁰⁰⁸ jury was sufficient to establish the *corpus delicti* and the felonious intent with which the appellant acted.

Appellant insists that, because murder is charged in the indictment, a verdict of guilty of manslaughter cannot be sustained. This contention needs no extended consideration. Section 7926 of the Revised Statutes is conclusive of this question: See *In re Alcorn*, 7 Idaho, 101, 60 Pac. 561.

It is also contended that a reversal must be had upon the ground that the trial court denied the motion in arrest of judgment made by the appellant, based upon the failure of the indictment to allege the day and year when the alleged criminal operation or attempted abortion occurred. The indictment charges as follows: "That the said R. J. Alcorn, on or about the twenty-first day of June, and before the finding of this indictment, Kootenai county, state of Idaho, in and upon one Cora A. Burke, feloniously and of his malice aforethought did make an assault, and did then and there feloniously and of his malice aforethought force, thrust, and strike a certain instrument to the jurors unknown which he, the said R. J. Alcorn, then and there held in his hands, up into the womb and body of the said Cora A. Burke, and did supply and administer and procure the said Cora A. Burke to take divers medicines and drugs, who was then and there pregnant with child, with the criminal intent thereby to procure the miscarriage of the said Cora A. Burke, when the said miscarriage was not necessary to preserve the life of the said Cora A. Burke, thereby then and there inflicting on the said Cora A. Burke, in and about her womb and other internal parts, certain wounds, bruises, and lacerations, and creating in the said Cora A. Burke a mortal sickness and feebleness of body. She, the said Cora A. Burke, did then and there languish and continually languish until, on or about the twenty-third day of June, 1899, she there died. And so the said R. J. Alcorn did, in manner and form aforesaid, feloniously, unlawfully, willfully, deliberately, premeditatedly, and of his malice aforethought, kill and murder the said Cora A. Burke, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the

state of Idaho." A reading of the indictment shows that the ~~date~~ date of the assault is not specifically given; yet in one sentence the indictment alleges that the assault was made June 21st, and that the deceased languished until June 23, 1899, and then died. Can any reasonable inference, other than that the deceased died three days after the assault, be drawn from the language used? Be this as it may, the question should have been raised by demurrer. It was not. There is no showing made that appellant was misled to his prejudice by the defect in the indictment complained of by him. Under the provisions of sections 7686, 7960, and 8236 of the Revised Statutes, we feel constrained to hold that the trial court properly overruled the motion in arrest of judgment.

It is argued on behalf of the appellant that it was prejudicial error on the part of the trial court to admit the declaration of the deceased, made to the witness Mrs. Johnson at the time said witness introduced deceased to the appellant, touching her condition as to pregnancy. It is contended that this is hearsay evidence. It was hearsay. But hearsay evidence is sometimes admissible. Declarations of the parties to a transaction and sometimes of third parties who are dead, relating to and explanatory of the principal act being investigated, are admissible, especially when such declaration is against the interest of the party making it. The declaration was against the interest of the deceased. It tended to show a state of facts inconsistent with her observance of the rules of chastity. No beneficial purpose of the deceased could be served by the declaration. It tended to show her motive in meeting the appellant. Taken in connection with declarations of the appellant—for instance, his declaration made to the witness Ketchum—it tends to show the nature of the relations between appellant and deceased; and while appellant objected to the evidence proving this declaration, yet, to subserve his own ends, he testifies to alleged declarations made by the deceased at the same time in regard to her condition. If the declarations of deceased as to her condition are admissible, and appellant took that ground in the trial court, it is upon the idea that it is either a part of the *res gestae*, or else on the ground that it was connected with the alleged offense, made, not in favor of, but against, the interest of the declarant, who is now dead; ^{§10} hence, that in all probability the statement is true. Now, if declarations made to the appellant under such circumstances are competent, why is not the declaration of the deceased made to Mrs. Johnson, as testified to by her, competent? If this dec-

laration had been made after the assault, it would not have been admissible; but it was made before the transaction between appellant and deceased commenced, with direct relation thereto, against the interest of the party who made it, and who is now dead, and we think it admissible. In his work upon Evidence, third edition, Mr. Wharton, at section 258, says: "The area of events covered by the term '*res gestae*' depends upon the circumstances of each particular case. When a business man coolly and disengagedly completes half a dozen distinct negotiations in the course of an hour, the sweep taken by the *res gestae* in each case is limited to what is done in the time of the particular negotiation. When, however, one man of high parts and great energy is employed in a single protracted negotiation of great importance, then we can conceive of his whole time for weeks being absorbed in the negotiation, and of its tinging with its characteristics everything that he does and says, so that for all this period the things which he does and says become rather the incidents of the negotiation than of himself. So if, in one of our streets, there is an unexpected collision between men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. When, again, there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that said parties do and say under such circumstances is as much part of the *res gestae* as the blows given in the homicides for which particular prosecutions may be brought." Again, at section 259, the same author says: "The *res gestae* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings ⁶¹¹ and doings of anyone absorbed in the event, whether participant or bystander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act—necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actor. They are the act talking for itself; not what the people say when talking about the act. In other words, they must stand in immediate causal rela-

tion to the act, a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible, though hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay the act. It is the power of perception unmodified by recollection that is appealed to, and not of recollection modifying perception. Whenever recollection comes in, whenever there is opportunity for reflection and explanations, then statements cease to be part of the *res gestae*. Aside from the temptations to the parties, when they have time to collect themselves, to palliate or aggravate, there is a tendency to exaggeration, apt to swerve the memory of those who were witnesses of any casualty or collision when they talk about it after it is over. Hence, it is important for the interests of truth and justice that the statements of neither parties nor bystanders, made after the event, should be received on trial, unless under the responsibility of an oath and with opportunity of cross-examination." We conclude that the declaration of deceased, testified to by Mrs. Johnson, was properly admitted. The trial court in its instructions told the jury that the declaration of deceased testified to by Mrs. Johnson must be received by them with great caution, and was not sufficient of itself to establish the fact that deceased was pregnant, but that such declaration would not justify the conclusion that she was pregnant, unless supported by corroborative testimony or circumstances such as would satisfy them beyond a reasonable doubt that deceased was pregnant.

⁶¹² It is seriously contended that the trial court committed a reversible error in giving instruction No. 3, to the effect that procuring or attempting to procure the abortion of a pregnant woman, when such abortion is not necessary to save the woman's life, by use of drugs, instruments or other means, is murder in the second degree or manslaughter, when death results. This instruction is erroneous, as the crime in such case is murder in the second degree under our statutes. Yet the error was beneficial, not prejudicial, to the accused; hence, is not reversible. Section 7926 of the Revised Statutes is as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense." A judgment of conviction will not be reversed upon the ground

that an erroneous instruction has been given, where such instruction does not prejudice a substantial right of the defendant.

The trial court instructed the jury that: "The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking all the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty." In *State v. Kruger*, 7 Idaho, 178, 61 Pac. 463, we refused to reverse a judgment of conviction upon the ground that the trial court gave a similar instruction. In the syllabus to that case, prepared by the court, it is said: "In the trial of a criminal case, where the evidence depended upon for a conviction is circumstantial, every fact necessary to connect the defendant with the commission of the alleged crime must be established to the satisfaction of the jury beyond a reasonable doubt; but this does not impose upon the prosecution the burden of proving every collateral or corroborative fact or circumstance in the case beyond a reasonable doubt." The instruction under consideration, while from an eminent authority (*Sackett on Instructions to Juries*), is in bad form and should not be given, for the reason that, unexplained by other instructions, it might mislead the jury. A careful study of the instructions given in this case convinces us that the law was fairly given to the jury, that the rights of the defendant were carefully guarded, the instructions being more favorable to him in many respects than he had a right to ask, and that, taking the instructions as a whole, the one at present under consideration did not prejudice the rights of the defendant or mislead the jury.

What we have already said disposes of the principal questions raised on behalf of appellant. Numerous other questions are argued in the exhaustive and able brief of counsel for appellant, yet in our view those not specifically mentioned here are merely collateral to those discussed, and necessarily follow those which we have considered. The principal conflict, whether it be of fact or theory, is based upon the testimony of the appellant touching the object or intent with which he made the operation detailed by the witness Rundell. He admitted that he made the operation—admitted the use of the speculum. He claimed, however, that he was removing a piece of hair dart which had pierced and lodged in the wall of the uterus of the deceased. The theory of the prosecution based upon the facts and circum-

stances proven, was the natural and reasonable one, and was adopted by the jury. The theory of the defense rested solely upon the evidence of the defendant as to the presence of the hair dart in the uterus of the deceased. The manner of its removal, as claimed by the appellant, was doubtless regarded by the jury as improbable. The appellant had been impeached by proving contradictory statements. His declaration, voluntarily made after his arrest, to the effect that he had not "touched" the deceased, and that the operation that he performed was on a man for stricture; his declaration to Ketchum, the evening that he performed the operation and four hours prior thereto, to the effect that he was expecting a miscarriage at any moment; his leaving the state so soon after the death of deceased—all had the tendency to destroy the theory of the defense in the minds of the jury, and under these conditions we do not feel justified in overturning the verdict of the jury. The crime for which appellant has been convicted is one of the worst known to the law. An unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interest of society, the divine ⁶¹⁴ law, the law of nature, the criminal statutes of this state, and is not only destructive of life unborn, but places in jeopardy the life of a human being—the pregnant woman. Both actors, when there are two, as in the case at bar, are guilty of felony, and ought to be punished by the law, if the woman survives; and, if she does not, then the person or persons participating in the abortion should be punished. This crime is one of grave consequences to society. The law prohibits it and prescribes severe penalties. The law ought to be strictly enforced. In a case of this kind, this court will not notice purely technical errors, which do not prejudice the substantial rights of the accused; for the purpose of reversing the verdict returned by the jury, especially, as in this case, where we are satisfied that substantial justice has been done. For the foregoing reasons the judgment and the order denying a new trial are affirmed.

Sullivan and Stockslager, JJ., concur.

The Principal Case is cited and considered, with other cases on death resulting from abortion, in the monographic note to *Johnson v. State*, 90 Am. St. Rep. 578, on unintentional homicide in the commission of an unlawful act.

MORGAN v. NEAL.

[7 Idaho, 629, 65 Pac. 66.]

AGENCY—Estoppel to Deny.—A purchaser of a note who permits the payee named therein to collect the principal and interest thereon, without notifying the maker of the note of his ownership, is estopped to deny the agency of the named payee to collect the money due on the note. (p. 266.)

Griffiths & Griffiths, for the appellant.

W. E. Borah, for the respondent.

STOCKSLAGER, J. This case is here for review on appeal from the district court of Canyon county, and from an order of said court overruling a motion for a new trial. In the complaint it is alleged: That on the twenty-ninth day of August, 1890, at Denver, Colorado, the defendant made and delivered to the Colorado Security Company his two certain promissory notes, to wit:

“\$200.

Denver, Colo., Aug. 29, 1890.

“On the first day of August, 1895, value received, for money loaned, I promise to pay to the order of the Colorado Security Company \$200, with interest on the same at the rate of two per cent per month after due until paid. And I hereby agree that if default is made in the payment of any one of the coupons hereto attached, or any part thereof, and the same shall remain due and unpaid for the period of thirty days, in such case this note, with the interest accrued thereon, shall, at the option of the legal holder hereof, become due and payable, and may be demanded and collected immediately, anything herein contained to the contrary notwithstanding according to the tenor of a certain deed of trust bearing even date herewith given by Horace E. Neal to Henry J. Aldrich, trustee, payable at the office of the Importers' and Traders' National Bank, New York City.

“HORACE E. NEAL.”

Indorsed as follows: “C. S. Loan No. 1703, \$200. Mortgage Note. Horace E. Neal to Henry J. Aldrich, trustee. Dated August 29, 1890. Due August 1, 1895. Pay to the order ⁶⁸² of ———, without recourse. The Colorado Security Co., by N. J. Morich, President. The Colorado Security Co., Denver, Colo.”

The second note is for eight dollars being the semi-annual interest on the two hundred dollar note, and is indorsed on back as follows: “Pay to the order of ———, without recourse. The Colo-

rado Security Co., Denver, Colo.” That plaintiff is the owner and holder of said notes, for a valuable consideration before maturity of said notes, in the ordinary course of business. That defendant has not paid said notes, or either of them, or any part thereof. Then follows demand for judgment against the defendant for amount of both notes and interest thereon from August 1, 1895. The defendant in his answer admits the execution and delivery of the notes. On information and belief, denies that the plaintiff is the owner or holder of them, or either of them, for a valuable consideration or before maturity, or in the ordinary course of business or at all. Alleges that prior to the commencement of this suit he had fully paid and satisfied both of said notes, and that such payment was to the owners and holders thereof. Upon the issues thus framed this cause was tried, and a verdict of the jury returned in favor of the defendant for his costs.

Counsel for appellant assign error as follows: “1. The ruling of the court at the trial admitting evidence intended to prove lack of notice on defendant’s part as to the ownership and possession of the notes; admitting evidence intended to prove payment to one without first proving or offering to prove authority on the part of that one to receive payment; giving improper instructions and refusing to give proper instructions to the jury. 2. The action of the court in submitting the fact of agency to the jury on evidence altogether consistent, and in no particular conflicting.”

The record discloses the following undisputed facts in this case: 1. Horace E. Neal executed and delivered the two promissory notes in controversy to the Colorado Security Company, of Denver, Colorado; 2. Said Horace E. Neal paid each of said coupons as they fell due, all payments being made to said Colorado Security Company; 3. That the plaintiff (appellant) neither personally nor through her agent ever notified defendant (respondent) ⁶³² that she was the owner and in possession of said notes; 4. That all coupons, after payment by respondent, were returned to him indorsed “Paid” by Henry J. Aldrich, president of the Colorado Security Company of Denver, Colorado; 5. That the note for two hundred dollars was paid by respondent before maturity, and was also paid to Henry J. Aldrich, president of the Colorado Security Company of Denver, Colorado.

It is urged by counsel for appellant that the indorsement on the back of the notes was sufficient to put the respondent on in-

quiry as to who was the real owner of the notes in controversy, and that when he paid the coupons and the notes, he did it at his own risk, and should now be held to respond to the appellant in the amount she alleges to be due her on said notes, notwithstanding the fact that he has fully paid all he contracted to pay in the obligations sued on, and to the party with whom he made the contract. The record does not disclose that respondent was ever notified by appellant, or anyone for her, that she was the owner of said notes, or that he was ever notified by anyone that the notes had passed from the possession of the original payee of said notes. All payments were made through the original payee of said notes, and final payment of said notes was made through the same channel, and the notes returned to respondent. Respondent testifies that he had no knowledge or information that appellant was the owner of said notes until long after he had made final payment thereof. From all these facts admitted by the pleadings and shown by the record, it seems clear to us that, if appellant was the owner of these notes (and we are satisfied from the record she was), she is estopped from denying the agency of the Colorado Security Company, and this is certainly true where it is shown that respondent acted in good faith in all payments. The old equity rule that where two parties are at fault, and one must lose, the one most at fault should suffer the loss, is applicable in this case. We think the rule of agency is correctly stated in *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762. The syllabus says: "A party who in good faith makes payments upon a promissory note to one whom he has reason to believe is the authorized agent of the holder thereof, and whose acts in receiving such payments have come to the knowledge of ⁶³⁴ the holder, and have not been repudiated by him, cannot be held for the money so paid to the agent." Applying this rule to the case at bar, we find that respondent had made all payments to the party with whom he made his contract, received all coupons indorsed "Paid," and finally the original notes were returned him indorsed "Paid," these payments covering a period of over four years: *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423; *Wilcox v. Chicago etc. R. R. Co.*, 84 Minn. 269.

We have examined the instructions given to the jury by the court to which counsel for appellant took exceptions, as well as those requested by appellant and refused by the court; and we find no error in either giving the instructions complained of, or refusing to give the instructions as requested by appellant.

In our view of the case, it is unnecessary for us to pass upon the question of the negotiability of those notes. It is immaterial in this case, as the opinion disposes of the right of the appellant to recover from respondent. The judgment of the trial court is affirmed, with costs.

Quarles, C. J., and Sullivan, J., concur.

The Principal Case finds support in *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762. For payments made to an agent held not to bind his principal, see *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Smith v. Kidd*, 68 N. Y. 180, 23 Am. Rep. 157.

YATES v. SPOFFORD.

[7 Idaho, 737, 65 Pac. 501.]

NEGOTIABLE INSTRUMENTS—Burden of Proof.—If defendant admits the execution of the note in suit, but denies that the holder is the owner thereof by purchase, before maturity, and alleges want of consideration, the burden of proving such allegations is on the defendant. (p. 269.)

NEGOTIABLE INSTRUMENTS—Holder for Value.—If a note is made payable to a named agent, and is by him sold, indorsed, and delivered before maturity for a valuable consideration, the purchaser is entitled to recover thereon. (p. 270.)

J. H. Richards and C. C. Cavanah, for the appellant.

Wyman & Wyman, for the respondent.

THE STOCKSLAGER, J. This action is based upon a promissory note, to wit:

"\$136.75

Boise, Idaho, April 28, 1899.

"Six months after date for value received, I, we, or either of us, promise to pay to the order of Harry Timmons, agent, \$136.75, at the Capital State Bank of Idaho, Limited, Boise, Idaho, without defalcation or discount with interest at the rate of six per cent per annum from maturity until paid both before and after judgment. It is also stipulated that, should this note be collected by an attorney, whether by suit or otherwise, — per cent shall be allowed the holder as attorney's fees.

(Signed) "JUDSON SPOFFORD."

By the complaint it is shown that this note was sold, indorsed, and delivered to plaintiff by Harry Timmons before maturity for a consideration, and that he is still the owner and holder

thereof. The answer denies that on the twenty-eighth day of April, 1899, or at any other time, defendant made, executed, or delivered to Harry Timmons this note or any other note. Admits that the defendant executed the note, but alleges that there was no consideration of any nature or kind for the execution of said note, all of which was well known to said plaintiff prior to the time such note came into the possession or under the control of said plaintiff. Alleges that Harry Timmons was agent of the Equitable Life Insurance Company of New York at the time of the execution of said note; that said note was executed and delivered to the said Harry Timmons as the agent of the said Equitable Life Insurance Company, and was given with the distinct understanding that the same was to be for the premium of the life insurance policy to be executed and delivered by said Equitable Life Insurance Company for five thousand dollars, and that the same was to be delivered to this defendant within ten days from April 28, 1899, or upon failure so to do, the said note was to be returned to this defendant; that the said life insurance policy was never delivered to defendant—all of which was well known to plaintiff prior to the time of his alleged ownership of said note, and all of which more fully appears by a written contract made by the said Harry Timmons, agent of the said Equitable Life Insurance Company, which contract is as follows:

740 "Boise City, Idaho, April 28th, 1899.

"Received of Judson Spofford two notes of even date herewith, aggregating \$226.75, in full for first annual payment \$5,000 insurance in the Equitable Life of N. Y.; said notes to be returned if policy is not delivered to him in ten days from this date; policy to take effect from this date.

"HARRY TIMMONS,
"Special Agent."

Upon the issues thus formed this cause was tried, a jury having been waived. Plaintiff offered in evidence the note above referred to, to which defendant objected. The note was read in evidence, and marked Plaintiff's Exhibit "A." Plaintiff rested. The defendant moved for a nonsuit, which motion was overruled. The defendant refused to offer any evidence. The court rendered judgment for the face of the note, with interest and costs. Defendant alleges the following errors: "1. The evidence introduced in said cause is insufficient to justify the decision of the court, as follows: The note introduced in evidence shows that the same was made payable to Harry Timmons, agent, and not

to Harry Timmons as an individual, and shows that Harry Timmons as an individual indorsed said note to the plaintiff, and that such note was not indorsed in the name of the true owner, and that there is no evidence to show any consideration given by the plaintiff for the assignment of such note, and there is no evidence to show that the plaintiff is the owner or holder of such note, and the note shows upon its face that Harry Timmons was not the owner of such note. 2. The note shows on its face that Harry Timmons was not the payee of such note. That such note also shows that the same was never indorsed by the payee of said note. That such note shows that the plaintiff is not the legal owner or holder of such note. 3. The court erred in overruling the objection of the defendant to the introduction of said note in evidence. The court erred in holding that Harry Timmons was the payee of said note. The court erred in holding that said note was indorsed to the plaintiff. The court erred in holding that plaintiff is the legal owner and ⁷⁴¹ holder of such note. The court erred in overruling the motion of defendant for nonsuit."

It will be observed, from the above statement of the pleading, facts, and errors relied upon by appellant, that the question presented to this court is, Was there error in the order of the court below overruling defendant's motion for a nonsuit? The record shows that the only evidence introduced on behalf of respondent was the note in question; that the defendant then moved for a nonsuit, which being overruled, he neglected and refused to offer any testimony to sustain his answer, and relies upon this motion for a reversal in this court. Appellant calls our attention to a number of authorities to establish that Timmons was not the real owner of the note at the time he sold it to plaintiff, by reason of said note being made payable to Harry Timmons, agent. If such were the fact, it would have been a good and valid defense to this action; and, under his answer, we apprehend the trial court would have permitted him to prove such fact. The court recites in the judgment, to wit: "The plaintiff having introduced certain documentary evidence, and the defendant refusing to offer any evidence, and the evidence being closed, the cause was submitted to the court for consideration and decision," etc. We think, when the plaintiff introduced the note in evidence, he made a prima facie case, and if there was merit in the answer of the defendant, and after the court denied his motion for a nonsuit, he should have submitted his proof; but it seems he did not do so, or even offer to do so, or offer any

excuse or reason for not doing so. That the plaintiff had the right to sue and recover in this action on the note described and set out in haec verba in the complaint, we think is settled by the authorities. In *Bank of New York v. State Bank of Ohio*, 29 N. Y. 619, cited by appellant, it appears the note was payable to D. C. Converse, cashier, and indorsed "D. C. Converse, Cr." Suit was brought against the bank of which he was cashier on this indorsement. The court says: "Had there been nothing in the case to connect the bill with the defendant's bank, Converse would have been regarded as the payee and the indorser, individually, and the abbreviation affixed to his name considered as a descriptio ⁷⁴² personae": *Preston v. Dunham*, 52 Ala. 217; *Chamberlain v. Pacific Wool-growing Co.*, 54 Cal. 103; *Tiedeman on Commercial Paper*, sec. 85, p. 152; *Randolph on Commercial Paper*, sec. 156, p. 238; *Mechem on Agency*, sec. 443, p. 288, rule 2b; 4 *Am. & Eng. Ency. of Law*, 2d ed., 318; *Daniel on Negotiable Instruments*, sec. 271, and cases cited. The answer set up a good and valid defense to the note in this action, and was sufficient to admit of proof on all the allegations thereof, and we assume the court would have admitted such proof had it been tendered. No such tender was made. The judgment of the trial court is affirmed, with costs to respondent.

Quarles, C. J., and Sullivan, J., concur.

If a Note is Made Payable to the order of "Adolph Pike, President," and so indorsed, the word "president," in each instance, is mere descriptio personae. The note is, therefore, not payable to the order of the corporation, but to the president individually, and the indorsement is his individual indorsement: *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304, and see the cases cited in the cross-reference note thereto; *First Nat. Bank v. Hall*, 44 N. Y. 395, 4 Am. Rep. 698. An examination of these cases will disclose that there is a difference of judicial opinion as to the legal effect of negotiable instruments drawn in this form.

Possession of a Negotiable Note properly indorsed is prima facie evidence that the holder is a bona fide purchaser: *Clark v. Skeen* 61 Kan. 526, 78 Am. St. Rep. 337, 60 Pac. 327; *Manhattan Sav. Inst. v. New York Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

SIFERS v. JOHNSON.

[7 Idaho, 798, 65 Pac. 709.]

CONSTITUTIONAL LAW—Police Regulation of Animals.—A statute providing that it shall be unlawful to herd or graze sheep within two miles of an inhabited dwelling and making the owner of the sheep liable in damages therefor, is a valid and constitutional exercise of the police power. (pp. 272, 273.)

G. C. Barnum, for the appellant.

L. L. Sullivan, for the respondent.

THE QUARLES, C. J. The plaintiff commenced this action in the justice's court of Soldier precinct, in Blaine county, to recover damages from the defendant by reason of trespass committed by sheep belonging to and under the control of the defendant upon the premises, and within two miles of the same. The plaintiff recovered judgment, and the defendant appealed to the district court; and upon a trial in the district court plaintiff recovered a verdict for one hundred dollars damages, upon which a judgment was entered in favor of the plaintiff and against the defendant for the sum of one hundred dollars and costs. Defendant then moved for a new trial, which being denied, he appealed from the order denying a new trial and from the judgment.

It appears from the record that the respondent owns the lands upon which he resides and which he farms in fee simple; that he has his said lands inclosed, and, at the date of the trespass complained of, had growing crops thereon, same being inclosed with barbed-wire fences; that the sheep of appellant were herded and grazed immediately around the residence and farm of the respondent, and trespassed within his inclosures; that a few of the sheep died—some within the field of respondent, and some very near to his house—and were permitted by appellant to there remain. The damage done to respondent was estimated at from one hundred dollars to two hundred and fifty dollars by the witnesses, including that within his inclosure, and that to the pasturage without, but within two miles of his dwelling. The evidence also shows that appellant had five bands of sheep—about two thousand in each band—grazing within two miles of the dwelling of the respondent, and so destroyed the pasturage that cattle and horses could not exist there; that cows will not graze where sheep have been grazed the same season. The respondent expostulated ⁸⁰⁰ with appellant about the latter grazing his bands

of sheep about and around his dwelling; whereupon appellant said to respondent, in substance, that "when he was in the cattle business the sheepmen ran sheep in on his range and destroyed the range, and he had to go out of the cattle business, and now he was in the sheep business, and he didn't know any way for us to do but to take our medicine." It appears that the jury took into consideration both the damages that respondent sustained by reason of the sheep trespassing within his fields and those sustained by him by reason of the sheep being grazed within two miles of his dwelling.

Sections 1210-1212 of the Revised Statutes of Idaho are as follows:

"Sec. 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling-house of the owner or owners of such possessory claims.

"Sec. 1211. The owner or the agents of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained.

"Sec. 1212. When the owner or the agent of such owner of sheep found trespassing upon the land or possessory claims of another, or within two miles of the dwelling-house of the claimant or occupant of such possessory claim, is unknown to the party injured by such trespass, all sheep so trespassing may be treated as estrays."

It is contended by appellant that these statutes are unconstitutional and void. Appellant also contends that, if these sections are held valid, they do not apply to this case, for the reason that the respondent owned the land upon which his dwelling was situated, and the same was not upon a possessory ⁸⁰¹ claim. The latter contention is not tenable, as the legislature evidently intended to protect settlers from the injury and annoyance of having sheep herded and grazed around their habitations, whether they possessed the same absolutely and had title thereto, or held only by mere naked possession. The other contention raises the serious question in the case. As we view it, this is purely a question of police power. The police power of the state is very

great. Under it many things may be done which at first glance seem to infringe upon natural and civil rights. The protection of health, prevention and suppression of nuisances, controlling the conduct of business which affects others not engaged in the same, the preservation of the public peace and protection of the public welfare are legitimate subjects calling for the exercise of the police power of the state. Judge Cooley, in his work on Constitutional Limitations, sixth edition, at page 704, says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of the rights of others." The same author, at page 705, quotes from Chief Justice Shaw, in *Commonwealth v. Alger*, 7 Cush. 53, with approval, this language: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing ⁹⁰² and controlling power vested in them by the constitution, may think necessary and expedient." At page 743 the said author says: "The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous." In his work upon State and Federal Control of Persons and Property, Mr. Tiedeman, at page 838, says: "In every state the keeping of livestock is under police regulation. . . . The clash of interest between stock-raising and farming calls for the interference of the state by the institution of police regulations; and whether the regulations shall subordinate the stock-raising interest to that of farming, or vice versa, in the case of an irreconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial ques-

tion. In the exercise of this general power of control over the keeping of livestock, the state or municipal corporation may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures." Inasmuch as the legislature may prohibit the running at large of livestock, we see no reason why it should be held that it may not prohibit the running at large altogether of certain livestock, nor why certain livestock (for instance, sheep) should not be forbidden to be herded within two miles of the dwelling of a settler. We have statutes which, in effect, prohibit hogs from running at large. See sections 1340 to 1344, inclusive, of the Revised Statutes, wherein it is provided that the owner or occupant of premises need not fence against hogs; that the owner of hogs that trespass upon the inclosure of others is liable for damages; for the impounding of trespassing hogs, etc. These statutes, like those in question here, were enacted to protect the farmers from annoyance and injury caused by the trespassing of hogs, and to save them expense in fencing against hogs. It is a matter of common knowledge and experience that a fence will keep out cattle and horses that will not sheep or hogs. It is evident that in passing the statutes cited, relative to the running at large of hogs, and the herding and grazing of sheep within two miles of dwelling-houses, the legislature intended to further the public good and preserve the peace, by ⁸⁰³ preventing those conflicts which would naturally result from the herding of sheep about the dwellings of settlers. The statutes were intended to promote the public good and avoid danger and injury to the citizen. They were also evidently intended to protect the health of the settlers, and as those questions are of legislative discretion, and not judicial, we are not authorized to hold the statutes unconstitutional.

It is contended by the appellant that every citizen has the right to pasture the public domain, and that, if the statutes in question are held valid, it amounts to taking property without due process of law. There is nothing in this contention. We know of no statute enacted by Congress which grants the citizen the right of pasturage upon the public domain, and counsel for appellant cites no such statute. Citizens graze their stock upon the public domain by sufferance of the general government, and not by virtue of any vested right. When Idaho was admitted into the Union of states, she was not fettered or restricted in the exercise of the police power that attaches to statehood by any provision in the admission act, and it cannot be reasonably contended

that, because lands are situated within her borders that belong to the general government, and which private parties are permitted, by sufferance, to pasture, she is limited in the exercise of what would otherwise be legitimate police power. It follows from what has been said that the statutes in question are valid. Finding no reversible error in the record, the order denying a new trial and the judgment are affirmed, with costs of appeal to the respondent.

Sullivan, J., concurs.

Stockalager, J., dissents.

It is a Proper Exercise of the Police Power to prohibit the running at large of domestic animals: See *Wilson v. Beyers*, 5 Wash. 303, 54 Am. St. Rep. 858, 32 Pac. 90; *Cochrane v. Mayor of Frostburg*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703; monographic note to *Booth v. People*, 78 Am. St. Rep. 240.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MURRAY v. QUIGLEY.

[119 Iowa, 6, 92 N. W. 869.]

LAND PATENT—Cancellation for Fraud.—A patent to land should not be set aside for fraud in procuring it except upon the most convincing evidence. (p. 280.)

LAND PATENT—Fraud, Knowledge of Presumed.—Persons alleging fraud in the issuance of a patent are conclusively presumed to have discovered it at the time the patent was recorded, if they have lived for years in the vicinity of the land, with knowledge of the possession of the patentee, and at least some of them with actual knowledge of his claims, and the character of his title has been a frequent subject of discussion among those interested therein. (p. 280.)

QUIETING TITLE—Limitation of Action in Case of Fraud.—Parties cannot, by naming their petition an action to quiet title, have a conveyance annulled for fraud, when its fraudulent character has been known to them for thirty years. (p. 281.)

QUIETING TITLE by Remainderman—Limitations.—Remaindermen out of possession, and while the life tenant is alive, are authorized by the Iowa statutes to bring an action to determine and quiet their title, but they must do so within the statutory period. (p. 281.)

COTENANCY—Ouster and Adverse Possession.—The conveyance of the entire property by one cotenant operates as an ouster of the others, and serves as a basis for adverse possession by the grantee. (p. 282.)

Suit for partition and for confirmation of title in the plaintiffs. April 16, 1852, C. P. Beeman purchased the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of 21-97-5 from the school fund commissioners of Allamakee county, taking a contract therefor in accordance with law. April 30th of the same year he and C. D. Beeman, his brother, purchased the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of 33-97-5 from the same party, taking a contract therefor. C. D. Beeman conveyed this

last 40 to C. P. Beeman and his wife, now Abigail Howell, in March, 1857, and in August of that year a patent was issued for the same to C. D. and C. P. Beeman. The latter Beeman died intestate in 1860, his wife Abigail and his daughter Harriet Ann surviving him. In September, 1860, his widow conveyed the whole 120 described, and in April, 1868, her grantee reconveyed it to her. On June 1, 1868, a patent was issued to John Quigley for the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of 21, which was recorded on the 20th of July following; and on June 2, 1868, Abigail Howell and her husband gave John Quigley a deed of the three 40's described, which was recorded the same day. The plaintiffs claim title through the grantees of Quigley, and the defendants, other than Mary Quigley, claim as heirs of C. P. Beeman and his daughter Harriet. They allege that the interest conveyed by Abigail Howell was a life estate, and that they are the remaindermen; and that the patent to John Quigley was procured by fraud. They pray for affirmative relief. From a judgment quieting title in the plaintiffs and Mary Quigley, and ordering partition, the defendants other than Mary Quigley appeal.

W. S. Hart, for the appellants.

D. J. Murphy and J. F. Dayton, for the appellees.

* SHERWIN J. At the time of her husband's death, in 1860, Abigail Beeman took one-third interest in his estate for life only, under section 2477 of the Revision of 1860. The daughter Harriet, the only surviving child of C. P. Beeman, died in September, 1861, and upon her death, her mother took a life estate in her property, under section 2498 of the Revision, which is as follows:

"Sec. 2498. If the mother be the surviving parent as contemplated in section 3 of this act, she shall take only a life estate in the intestate's property, and after her death it shall go to the children of her body, if there be any had by her deceased husband, he being the father of the intestate. If there be no such children, nor issue of such children in the descending line, then the intestate's property shall be divided between the nearest heirs of the father and mother of the intestate, share and share alike, and after such distribution is made the same rules shall be applied to any further distribution thereof, as prescribed in this act."

No question is made as to the estate vesting in the widow upon the death of her husband and child nor as to the then situation of the remainderman. Soon after he acquired the patent to the

land and took a conveyance thereof from the Howells, John Quigley conveyed an undivided two-thirds interest therein to his brother, Michael Quigley, by warranty deed, which was duly recorded. Some eight years thereafter Michael Quigley conveyed this interest to his wife, Mary Quigley, who left it to the plaintiffs herein by her will, which was duly probated in 1895. John Quigley conveyed his remaining one-third interest in the land to his wife, Mary E. Quigley, one of the defendants herein in 1896. During his life C. P. Beeman made some payments under his contract for the purchase of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of 21, and at the time of his death the contract was still alive, and not wholly performed, and, unless he made an assignment of his rights under this contract before his death, he died the equitable owner of the land, and his widow and sole heir would take his interest therein, and nothing more. But the patent for this land was issued to John Quigley by the proper state authority, and, if he was entitled to the patent as the assignee of the rights of C. P. Beeman under the contract of purchase the patent vested the absolute title in him, so far, at least, as the defendants are concerned, and they have never had any rights as remaindermen.

¹⁰ The contract in question was entered into and the land sold to Beeman under the provisions of the school fund act of 1847, which provided for sales either for cash or on time, under the direction of a school fund commissioner, and for the issuance of a patent by the governor of the state upon the certificate of purchase of the clerk of the district court of the county in which the land sold was situated, that full payment therefor had been made. In accordance with the requirements of this act, the clerk of the district court of Allamakee county issued to John Quigley a certificate under date of June 25, 1868, which is as follows:

“Certificate of Final Payment.

“Office of Clerk of Dist. Court,

“Allamakee County, Ia., June 25, 1868.

“This is to certify that C. P. Beeman purchased of Elias Topliff, school fund commissioner for the county of Allamakee, on the 6th day of April, A. D. 1852, under the provisions of an act of the general assembly of Iowa entitled ‘An act to provide for the management and disposition of the school fund,’ approved Feb. 25, 1847, and the amendment thereto, the following tract or parcel of land, to wit: E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of sec. 21, town. 97 north of range 5 west of the 5th principal meridian, containing eighty acres, at one dollar and twenty-five cents per acre, amount-

ing to the sum of one hundred dollars, which sum, with interest accruing thereon, having been paid in full by John Quigley, assignee of C. P. Beeman, as required by law, entitled him to receive from the governor of Iowa a patent for the land herein described upon the presentation hereof to the register of the state land office. Given under my hand and official seal the day and year first above written.

“G. P. EELLS,
“Clerk of District Court.
“By John Ryan, .
“Deputy.”

Upon the presentation of this certificate to the governor of the state, a patent for the land was issued to John Quigley, as we have already stated. It is undoubtedly true that a patent or any other conveyance of land which is procured by the fraud of the grantee may be annulled ¹¹ and set aside by proper proceedings instituted in proper time, but the acts of public officers which are authorized by law, and their solemn declarations in official certificates which they are required to make should not be treated lightly, nor should they be declared false except upon the most convincing evidence. The contention that the patent in question was procured by the fraudulent acts of John Quigley and the clerk of the district court who issued the certificate has but slight evidence for its support. It is true that the widow of C. P. Beeman, now Abigail Howell, testifies that her husband had never met John Quigley, and that when Quigley took the conveyance from her she delivered no papers to him other than the deed, but in weighing her testimony on this subject it must be borne in mind that she was testifying to a transaction which occurred nearly thirty years before, and that her testimony contradicts her acts of 1868, when she received from John Quigley the full value of the fee title of the land, and executed and delivered to him in exchange therefor a deed which purported to convey the title which he had paid for. In addition to this, the record discloses that, notwithstanding her previous acts, she was an interested witness against the plaintiffs by reason of the fact that two children by her late marriage are defendants, and claiming adversely to the plaintiffs. The contract is not before us, nor was it produced on the trial below, and we presume that it is not in existence; and there are some features of the case which indicate that there might never have been an assignment of Beeman's interest therein, but they are not of such a convincing character that we can say that, taken in connection

with the testimony of Mrs. Howell, they prove fraud in procuring the patent.

2. It is not necessary, however, to rest our determination of the case on this feature alone. John and Michael Quigley went into possession of the land at once, ¹² and they and those claiming under them have continued in possession to the present time. The defendants have all of the intervening years lived in the immediate vicinity of the land, and have had full knowledge of this possession; and, moreover, some of them, at least, have known, since John Quigley took possession in 1868, that he and Michael were claiming the fee title of the land. The recorded patent was notice to the world that he held the legal title in fee. Nor was this the only knowledge which the defendants had, for it is shown that in conversation with some of the defendants he expressly asserted such ownership, and it was denied by them. So, too, it is shown that the character of the title held by John and Michael Quigley was a subject of frequent discussion among those interested therein, and it is not going too far to assert that the extent of their claims was known to all of the defendants for years, and to some of them for twenty-eight years, before their answer was filed in this case. Yet not until this action was commenced and the answers filed by the defendants did they invoke the aid of the law to right the alleged fraudulent acts of John Quigley and the clerk of the court who issued the certificate upon which the patent was issued, though the fraud, if any there was, was known to them upon the filing of the patent for record; for such fraud is conclusively presumed to have been discovered at that time: *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9.

3. It is contended by the appellees—and, we think, rightly so—that under these conditions it was the duty of the defendants to bring their action to set aside the patent within the five-year limitation period (Revision, sec. 2740; Code 1873, sec. 2529): *Bishop v. Knowles*, 53 Iowa, 268, 5 N. W. 139; *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9. The appellants do not controvert this as a general proposition, but they ably contend that the affirmative relief asked by them is simply that their title ¹³ be quieted, and that such relief is never barred by the statute of limitations. While there is much of plausibility in the argument advanced, we think it fallacious. As the record stands, they have not now, and have never had, a shadow, even, of title to any part of the land now under discussion, and during all of these years the plaintiffs and their grantees have been in posses-

sion thereof under a claim of an absolute title in fee supported by a recorded instrument, which conveyed to them precisely such a title; and the defendants, to establish their interest in the land, must prove the fraudulent procurement of the patent. In other words, their position is that, by naming their petition an action to quiet title, they may have a conveyance annulled and declared void, the fraudulent character of which has been known to them for thirty years. To so hold would be a judicial destruction of the statute of repose, which would open the door for endless litigation.

4. It is further argued that, as the defendants are remaindermen, and the life tenant still alive, they have at no time had such a definite and certain interest in the property as would warrant any interference on their part, and that they were, for that reason, not called upon to assert their rights until this action was commenced. The rights of the remaindermen, however, were vested upon the death of those through whom they claim, and the defendants are here asserting such rights which are no greater or more certain now than they have been for years, and at all times they have been authorized by direct statutory enactment to institute proceedings to determine the question of title. They might have proceeded under section 3757 of the Revision (section 3345 of the Code of 1873), or they might have brought an action under section 3601 of the Revision (section 3273 of the Code of 1873). The latter section, by its terms, authorizes reversioners or remaindermen to bring actions for determining and quieting questions of title, and ¹⁴ is as follows: "An action in the nature of that authorized in this chapter may also be brought by one having a reversionary interest, or by one either in or out of possession against another who claims title to real property, although the defendant may not be in possession thereof for the purpose of determining and quieting the question of title."

No right to bring a possessory action was therein given, and it is manifest that the purpose of the act and of subsequent ones of the same import was to provide a speedy way for settling disputed questions of title between those rightfully in possession of the land, and those who claimed a reversionary interest therein. Without such statutory authority, a reversioner out of possession, and with no right thereto, could not maintain an action against one in possession as a life tenant, and it was undoubtedly the thought of the legislature that the welfare of those interested, as well as of the public in general, would be best subserved by providing a means whereby apprehended litigation affecting

the use and enjoyment of real property might be at once settled: *Force v. Stubbs*, 41 Neb. 271, 59 N. W. 798; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557. And, indeed, the purpose and intent of the statute seems to us to reach further than this, and to imply that such questions must be settled within the statutory period. There can, at least, be no hardship in holding such to be the rule in cases where there is no disability, and where the facts upon which apprehended litigation will rest are fully known. And more especially is this true where the possession is or may be held under a title entirely independent of and hostile to the life tenant.

5. The appellees also rely upon title by adverse possession, but as what we have already said disposes of the case so far as the eighty acres of land is involved, we need not discuss this question, though we may say that ¹⁵ we are inclined to the opinion that the claim is good under the facts presented here, though we do not definitely so declare.

6. The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of 33 was patented to C. D. and C. P. Beeman, and C. D. and his wife conveyed their interest therein to C. P. and his wife, Abigail, and they became tenants in common of the forty, as did also Abigail and the reversioners, and her conveyance of the entire forty to Quigley in 1868 was an actual ouster of her cotenants, and continued possession thereof under color of title and claim of ownership for the statutory period barred the defendants: *Kinney v. Slatery*, 51 Iowa, 353, 1 N. W. 626; *Burns v. Byrne*, 45 Iowa, 285; *Nelson v. Davis*, 35 Ind. 474.

The judgment of the district court is affirmed.

Bills to Remove Clouds on Titles are discussed in the note to *Scott v. Onderdonk*, 67 Am. Dec. 110-112. As to who may maintain a bill to remove a cloud on title, see the note to *Helden v. Hellen*, 45 Am. St. Rep. 375-378. Ordinarily, such suit can be brought only by one in possession: *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352. As to pleading nondiscovery of fraud in a suit to quiet title, see *Loftis v. Marshall*, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571. And as to limitation of actions and laches in such suits, see *Pleasants v. Blodgett*, 59 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197.

If a *Cotenant Conveys the Entire Property*, this constitutes an ouster of his co-owners, and the possession of the grantee may be adverse to them: *Beall v. McMenemy*, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 164; *Sudduth v. Sumerai*, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883, and cases cited in the cross-reference note thereto.

PARSONS v. MANSER.

[119 Iowa, 88, 93 N. W. 86.]

BEES—Notice of Propensities.—The owner of bees is chargeable with knowledge of their habits and evil propensities. (p. 284.)

BEES.—The Absolute Liability for Injuries received from wild beasts in confinement, declared in the earlier decisions, should not, even if sound, be extended to creatures so nearly domesticated as bees. (p. 284.)

ANIMALS.—Liability for the Safekeeping of animals depends, not so much upon their classification into wild and domestic, as upon their natural propensity for mischief. (p. 286.)

BEES.—Unless Some Want of Care in Their Management is shown, the owner of bees should not be held responsible for damages occasioned by them. (p. 286.)

BEES—Location of Hives.—The Owner of Bees must exercise ordinary prudence in so placing the hives as to avoid unnecessary danger to those likely to use the premises or highway near by. (p. 286.)

BEES—Negligence Where Horses are Stung.—If one places his beehives in the yard near a hitching-post standing in the highway, knowing the disposition of the bees to attack horses, and a traveler, the hives being in plain view, ties his horses to the post, where they are stung, the negligence of the keeper of the bees, and also the contributory negligence of the owner of the horses, are questions for the jury. (p. 286.)

BEES—Stinging Trespassing Horses.—If, through the negligence of the owner of the bees, they attack a team left without fault in the road near by, causing the horses to crowd through the fence in the vicinity of the hives, where they are stung to death, the rule that a licensee assumes the risk of the condition of the premises has no application. (p. 287.)

Action for the death of horses from the stinging of bees. From a judgment for damages, the defendant appeals.

O. C. Brown, for the appellant.

J. O. Watson, for the appellee.

⁸⁹ LADD, J. The plaintiff is a peddler of medicines. As such he called at the house of defendant to sell goods, on the 7th day of July, 1900. He had hitched his team to a post a little west of the gate leading to the house, in the highway south of it, and about five feet from the fence. There were two bee gums about twenty-five feet north of the post in defendant's yard, and three more ten or twelve feet farther on. Trees stood close together west and north of this yard, and shrubbery and bushes to the east. The only unobstructed passage was to the south and southeast. Shortly after entering the house, he heard a crash, and upon running out found that the horses had pushed

through or over the fence, and their heads were within a few feet of the hives. The hind wheels of the wagon were still on the fence, and one horse was lying down. Bees covered them. He immediately unhooked the traces, while defendant's daughter cut the lines, but both were soon compelled to flee for their own safety. Two gums were afterward overturned by the horses. She went after help, while he did what he could by throwing water on the horses and trying to remove them.

1. The beehives were painted white, and stood about two feet above the ground. They were in clear view from the road, so that plaintiff could have seen them had he looked. This he did not do, but hitched his team where injury was likely to occur. Appellant urges that he was guilty of contributory negligence, and that the evidence failed to establish negligence on the part of the defendant. But he was entitled to the free use of the highway, and had the right to assume that those keeping animals of whose mischievous nature everyone is presumed to have knowledge ⁹⁰ would exercise reasonable care for the protection of others from their depredations. True, bees may not be confined like the wild beasts. To roam seems to be necessary to their existence. They fly great distances, and, if interfered with, or their course obstructed, are likely to resent by the use of their only available weapon. Everyone harboring creatures *feræ naturæ* is charged with knowledge of their habits and evil propensities: *Moss v. Partridge*, 9 Ill. App. 490; *Commonwealth v. Fourteen Hogs*, 10 Serg. & R. 393; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Besozzi v. Harris*, 1 Fost. & F. 92; *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269.

There is no reason for an exception in favor of the bee. Indeed, their disposition to make themselves felt is a matter of common observation or experience from early childhood. But they are very useful, the aviary often furnishing a livelihood, and generally proving a source of profit; and the books seem to look with more favor upon the keeping of animals useful to man than those which are worthless save as curiosities. For this reason the rule of absolute liability for the consequences of injuries received from wild beasts kept in confinement, declared in the earlier decisions, even if regarded as sound, ought not to be extended to creatures so nearly domesticated: See *Spring Co. v. Edgar*, 99 U. S. 651; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99; *Vredenburg v. Behan*, 33 La. Ann. 627; *Filburn v. People's Palace etc. Co.*, 25 Q. B. Div. 258; *Manger v. Shipman*, 30 Neb. 352, 46 N. W. 527; *May v. Burdett*, 9 Q. B. 111. But

that rule seems to have been somewhat relaxed, or at least so explained as to be better understood. Judge Cooley, in his work on Torts, takes the position that, as the keeping of wild animals for many purposes has become recognized as proper and useful, the liability of the owner or keeper for any injury by them to the person or property of others should rest on the doctrine of negligence; that, while a ⁹¹ high degree of care is demanded, yet if, notwithstanding this, they do mischief, it should be treated as accidental only: Cooley on Torts, 348. In *Earl v. Van Alstine*, 8 Barb. 680, Sheldon, J., after a careful review of authorities then existing, reached the conclusion that liability depended not on the fact that animals occasioning the injury are *feræ naturæ*, but upon the owner's knowledge of their disposition. Thus domestic animals are by nature harmless, and upon this the owner may rely until he has ascertained to the contrary. If, however, he harbors a domestic animal known to him to be ferocious, he is liable, without proof of having become aware the animal has previously been guilty of like acts: See 2 Cyc. 368.

Wild animals are by nature fierce and dangerous, and hence of this everyone is charged with notice. That is their natural state. The conclusions he reached are: "1. That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part; 2. That is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have noticed the propensity of the animal to do mischief; 3. That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." In *May v. Burdett*, 9 Q. B. 101, the wife had been bitten by a monkey. The declaration alleged the ferocious character of the animal, and defendant's knowledge of it. Subsequent to verdict, defendant moved in arrest because of the omission to aver negligence, and Chief Justice Denman said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: That a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed. The negligence is in keeping such an animal after notice."

⁹² Liability for safekeeping depends not so much on the classification of animals into wild and domestic as upon their natural propensity for mischief. If they are ferocious and savage, like the lion, tiger, etc., the keeper is bound to know the

danger incident to their confinement; and the mere charge of not having been so restrained as to avoid injury is tantamount to an allegation of negligence. But bees, while generally classed as *ferae naturae* are so useful and common as to be all but domesticated. Keepers of the aviary have carefully studied their habits and instincts, and control them almost as certainly as domestic animals. Serious injuries from them are very rare, and, unless some want of care in their management is shown, the owner ought not to be held responsible for damages occasioned by them: See *Earl v. Van Alstine*, 8 Barb. 630. Nothing could be done by the keeper of bees to protect all from their attacks. These might occur miles from hives, and beyond his reach. But they have fixed habitations: *State v. Repp*, 104 Iowa, 305, 65 Am. St. Rep. 463, 73 N. W. 829. The location for these is always a matter for his determination, and it is not too much to exact of him the exercise of ordinary prudence in so placing the hives as to avoid unnecessary danger to those who are likely to make lawful use of the premises or the highway near by. In other words, he must, as was held in *Tellier v. Pelland*, 5 Rev. Leg. 61—a similar case—so use his own as not to interfere with the rights of others.

The defendant naturally expected people to visit his home, and that teams would in all probability be hitched to the post. It was put there and maintained for that purpose, and this in itself was an assurance that it was a safe place to leave horses. But that was the course the bees were likely to fly in going to and from their hives, and there was evidence to the effect that they were prone to attack horses when perspiring, if near them. Moreover, the defendant was advised of this, as his daughter⁹³ had cautioned a music teacher in his presence of the danger from them in tying her horse to this very post, but a few days before. In this respect the case differs from *Earl v. Van Alstine*, 8 Barb. 630, where the bees had been in the same place eight years without knowledge of their molesting any one. Because of their situation and the notice of their inclination to interfere with horses when hitched where plaintiff left his team, the question of defendant's negligence was for the jury, as was also that of contributory negligence.

2. Appellant has called attention to several authorities to the effect in principle that plaintiff, in entering defendant's premises, was merely a licensee, and assumed the risks of their condition: See *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 83 N. E. 1028; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60,

66 Am. St. Rep. 892, 41 S. W. 62; Gibson v. Leonard, 143 Ill. 182, 36 Am. St. Rep. 376, 32 N. E. 182; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; O'Connor v. Illinois Cent. R. R. Co., 44 La. Ann. 339, 10 South. 678; Hart v. Cole, 156 Mass. 475, 31 N. E. 644. What bearing this has on the case we are unable to understand. If, because of defendant's negligence, the bees attacked the horses left without fault in the road, and, owing to this, they crowded through or jumped over the fence in the vicinity of the hives, and were so injured as that death resulted, of which the first attacks were the proximate cause, then he is liable, regardless of any duty owing to plaintiff while on the premises.

3. Appellant urges that there was no evidence from which it could be found the bees stung the horses in the road. No direct testimony to that effect was offered, and it could hardly be expected that the bees attacking the horses would be specifically identified as defendant's. It was shown that the team was ²⁴ gentle; that the gums were about twenty-five feet distant, facing toward the horses; that the bees went away and returned in the direction of the horses; that, if the wind blew from the horses in the direction of the gums, they would be likely to attack them. The circumstances were such as to render it reasonably probable that the attack by bees from defendant's hives caused the horses to break loose. A gentle team would not be likely to break away because of the biting of flies, and the suggestion that some one else's bees may have done the mischief is not of importance, in view of the situation. We think the question was for the jury: See *Brownfield v. Chicago etc. Ry. Co.*, 107 Iowa, 254, 77 N. W. 1038.

Affirmed.

ACTIONS TO PREVENT OR COMPENSATE INJURY DUE TO BEES.

- I. Liability for the Attacks of Animals Generally.**
- II. Liability for the Attacks of Bees.**
- III. Bees as a Nuisance.**

I. Liability for the Attacks of Animals Generally.

In respect to property in animals, the common law divides them into animals *domitae naturae* and *ferae naturae*: See the note to *Wheatley v. Harris*, 70 Am. Dec. 259-262; 2 Blackstone's Commentaries, 390-396. And this classification has been projected into the law of torts, as a basis for determining the liability of the owner or keeper of animals for their vicious acts. The decisions abound

with the general statement that the owner of domestic animals is not answerable for their attacks upon man or beast, if rightfully in the place where the injury is done, unless he knew they were accustomed to do such mischief; but that the owner or keeper of wild animals is liable under all circumstances and at all events for injuries inflicted by them. If the offending animal is domesticated, then knowledge of his vicious propensity must be alleged and proved, in order to fasten responsibility for his doings upon the owner; if, on the other hand, the animal is wild, neither notice of his dangerous propensities, nor negligence in his keeping, need be proved; for the owner is conclusively presumed to have knowledge of his evil habits, and keeps him at his peril: *Reed v. Southern Exp. Co.*, 95 Ga. 108, 51 Am. St. Rep. 62, 22 S. E. 153; *Decker v. Gammon*, 44 Me. 328, 69 Am. Dec. 99; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; *Morgan v. Hodnell*, 52 Ohio St. 552, 49 Am. St. Rep. 741, 40 N. E. 716; *Crowley v. Groonell*, 73 Vt. 45, 87 Am. St. Rep. 690, 50 Atl. 546; *Spring Co. v. Edgar*, 99 U. S. 645; 1 Kincaid on Torts, sec. 237.

It has been suggested that these rules of liability are illogical, because many species of wild animals are practically harmless and seldom, if ever, disposed to do injury, while some of the domestic animals have very serious infirmities of temper not infrequently rendering them exceedingly dangerous. And hence it has been thought that the responsibility for the safekeeping of animals depends not so much upon their classification into wild and domestic as upon their natural propensity to do harm: See *Parsons v. Manser* (the principal case), ante, p. 283; *Earl v. Van Alstine*, 8 Barb. 630. In the last case Justice Selden remarks. "It will be found, on examination of the authorities upon the subject, that this classification of animals by the common law into animals *ferae naturae* and *domitae naturae* has reference mainly, if not exclusively, to the rights of property which may be acquired in them; those of the latter class being the subjects of absolute and permanent ownership, while in regard to the former, only a qualified property can exist; and the distinction is based upon the extent to which they can be domesticated or brought under the control and dominion of man, and not at all upon the ferocity of their disposition, or their proneness to mischief. For instance, the dog, some species of which are extremely savage and ferocious, is uniformly classed among animals *domitae naturae*, while the hare, the rabbit, and the dove, are termed *ferae naturae*, although comparatively harmless. It would not be rational to suppose that a classification adopted with exclusive reference to one quality of animals could be safely used to define and regulate responsibilities growing out of other and different qualities; nor would it accord with just analysis and logical accuracy, which distinguish the common law, that it should be resorted to for that purpose. And although some dicta may be found in the books which might seem to countenance the idea, the decided cases do not lead

to any such conclusion. . . . These authorities seem to me to point to the following conclusions: 1. That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part; 2. That it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have notice of the propensity of the animal to do mischief; 3. That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice."

"The law of England," to quote from *Filburn v. People's Palace & Aquarium Co.*, 25 Q. B. Div. 258, "recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew it was dangerous. What, then, is the best way of dealing generally with these different classes? I suppose there can be no dispute that there are some animals that everyone must recognize as not being dangerous on account of their nature. Whether they are *ferae naturae* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of the experience to be correct without further proof. Unless an animal is brought within one of these two descriptions—that is, unless it is shown to be either harmless by its nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe."

So far as concerns domestic animals, there is no doubt that their natural propensity to do mischief is a controlling factor in determining the diligence which the law exacts of the owner. The degree of care that will exonerate him must vary with the docility of the animal or the species to which it belongs. But it may be doubted whether this principle should be extended to wild animals, so as to relax the rule of absolute liability for their vicious acts. It should be remembered, in this connection, that the purpose for which an animal is kept, and the benefits accruing to mankind from his keeping, have a most important bearing upon the responsibility of the owner: *Earle v. Van Alstine*, 8 Barb. 630-636. It is well known that

the development of society has been wonderfully accelerated by the domestication of animals, and that without the assistance of what are denominated domestic animals, the present advanced stage of civilization would have been almost indefinitely postponed. And man still stands in need of these animals, and they constitute a very considerable portion of the wealth of the world to-day. Their keeping, then, is necessary and commendable. Not so, however, as to those animals that yet remain in their wild state. Comparatively little can be said in commendation of placing them in captivity; on the contrary, much can be said in condemnation of the practice. Viewing the question in this light, we see nothing unjust or illogical in holding their keeper absolutely liable for the mischief they may do.

II. Liability for the Attacks of Bees.

Measured by the foregoing principles, what is the duty and responsibility of the owner or keeper of bees? If the rule of absolute liability of the keeper of wild animals is conceded sound, it can have no application in the case of bees, for they have become so far domesticated that they can no longer, in any true sense, be termed animals *ferae naturae*. Their keeper is not, therefore, liable absolutely and at all events for injuries they may inflict: *Parsons v. Manser* (the principal case), ante, p. 283; *Earl v. Van Alstine*, 8 Barb. 630. Moreover, bees are not embraced in the class of animals that have little utility and value, and whose keeping is to be condemned rather than commended. Hence, another reason for a stringent or absolute responsibility on the part of the keeper is wanting: *Earl v. Van Alstine*, 8 Barb. 630-636.

But the owner of bees must be held to a knowledge of their vicious propensities, and manage them accordingly with due regard to the rights of others. In placing the hives in any particular place he must exercise ordinary prudence for the avoidance of unnecessary danger to those likely to make lawful use of the premises and highway near by: *Parsons v. Manser* (the principal case), ante, p. 283; *Tellier v. Pellant* (Quebec, 1873), 5 Rev. Leg. 61; *O'Gorman v. O'Gorman*, 2 Ir. K. B. Div. 573, 58 Cent. L. J. 283. In this last case, a recent decision from the Irish courts, the defendant had placed two straw hives on his land at the boundary fence and close to the dwelling of the plaintiff's father. The number was increased from time to time until at the time of the injury complained of there were about twenty. Complaints had been made to the defendant that the bees had caused annoyance when swarming, and he had been informed that haymakers on the adjoining land had been forced to quit work because of the attacks of the bees. On the day of the injury, the defendant, for the purpose of obtaining honey, applied a smoker to some of the hives to drive away the bees. A swarm of them crossed over the fence into the plaintiff's farmyard and lighted on a horse which he was engaged in harnessing. The horse

took fright as a consequence of which the plaintiff was seriously injured. The defendant knew the plaintiff was accustomed to harness his horse in the farmyard. The jury found that the bees were kept in a negligent manner, in unreasonable numbers, at an unreasonable place, and with appreciable danger to the occupants of the adjoining farm; that the honey was not taken from the hives with reasonable care, skill, and diligence; and that the plaintiff's injuries were caused by the bees stinging the horse. The damages were assessed at one thousand dollars. The king's bench division held that there was sufficient proof to sustain the verdict, and that the defendant had set up an actionable nuisance.

It would seem not too much to require that the hives be placed in some isolated or secluded spot, for there is no necessity for bringing them in close proximity to places certain to be frequented by other animals and by people. In this respect bees differ from such animals as the horse. It will be remembered that in the principal case the owner of bees was held liable for the death of horses from stinging, where he had placed the hives a short distance from the highway, and from a hitching-post therein, and had notice that they were prone to attack horses when near. But in *Earl v. Van Alstine*, 8 Barb. 650, the owner of bees was held not liable for the death of a horse which they stung while he was traveling in the highway, although the hives were kept in his yard adjoining the road. It appears, however, that they had been kept in the same location for eight or nine years, and there was no evidence of their doing any mischief before. As has already been suggested, it does not seem unreasonable to exact of the owner that he place his hives remote from public places. There is no necessity for placing them near the highway, and if he does so, it should be at his peril. To be sure, it is seldom that bees inflict serious injury to man or beast; but when such injury is inflicted, it ordinarily is near by the hives. The danger should be minimized, therefore, by requiring the hives to be kept a reasonably safe distance back from the highway or other public place.

III. Bees as a Nuisance.

It is clear that neither the keeping, owning, nor raising of bees is, in itself, a nuisance. Bees may become a nuisance, but whether in a given case they are so or not is a question to be determined judicially: *Town of Arkadelphia v. Clark*, 52 Ark. 23, 20 Am. St. Rep. 154, 11 S. W. 957. In this case it was decided that an ordinance undertaking to make it a nuisance to own, keep, or raise bees in the city without regard to whether in fact it is so, or whether bees in general have become a nuisance in the city, is invalid. In *Olmstead v. Rich*, 25 N. Y. St. Rep. 271, 6 N. Y. Supp. 826, nominal damages and a permanent injunction were awarded against the keeping of bees on a village lot adjoining the plaintiff's property. By their vicious acts they made his premises unfit for habitation, and constituted themselves a nuisance.

CARR v. MOORE.

[119 Iowa, 152, 93 N. W. 52.]

ACCRETION AND RELICTION—Drying up of Shallow Lake. A lake without definite shore line, having an outlet but no definite inlet nor subterranean source of supply, usually grown up with rushes and grass, generally not exceeding five or six feet in depth, and drying up and refilling with the variation of seasons, is not a lake such as to give occasion for the application to the doctrines of accretion and reliction. (pp. 293, 295.)

MEANDERED WATERS.—The Title of Abutting Owners on meandered waters extends, in Iowa, only to high-water mark, the title of the bed being in the state. (p. 294.)

MEANDER LINES do not Establish Character of Area Beyond. The running of a meander line does not conclusively establish the character of the area beyond the line, as to whether it is river, lake, marsh, or unsurveyed land. (p. 296.)

BOUNDARIES—Meander Line as.—A meander line is not, in a strict sense, a boundary, and the title of purchasers extends to the actual water line; but if there is no body of water corresponding to the meander line, to which the ownership of adjoining lands extends, then the meander line limits the extent of the land conveyed. (p. 296.)

ADVERSE POSSESSION Against the Sovereign.—Adverse possession of land is ineffectual when the title is in a state or the United States. (p. 297.)

SWAMP LAND.—The Determination of Whether Land is swamp must, in the first instance, be by the federal government; and, until such determination is made, a grantee has only an inchoate right, not amounting to a title. (p. 297.)

Suit to quiet title to land claimed by accretion or reliction. By cross-petition, the defendant asked that the land be decreed his as owner under the swamp land grant. Each party appeals.

Richard & Thompson, for the plaintiffs.

J. L. Kamrar and Douthart & Brendecke, for the defendant.

¹⁵³ **McCLAIN, J.** The controversy relates to portions of the bed of what was at one time known as "Iowa Lake," claimed to have been a body of water situated in Hamilton county, and in extent about a mile and a half each way, of very irregular outline, with a shore line of over six ¹⁵⁴ miles and an area of eight hundred and eighty-five acres. When the government survey of the surrounding land was made in 1849, the so-called lake was meandered, and the two plaintiffs own lots platted by the surveyor as bordering on this meander line. The bed of the lake is now practically dry land, and plaintiffs claim portions of the bed as having been added to their adjoining lots by accretion or

reliction, and ask that either the whole bed of the lake be decreed as owned in common by the adjoining proprietors in proportion to the extent of their assumed short line, or that by lines running from the intersections of their boundaries with such assumed shore line to some point which may be found to be the center of the lake, portions of the lake bed may be set off to them in severalty. Defendant claims title to the entire bed of the so-called lake, within the meander line, under purchase of the same, by his remote grantor from Hamilton county in 1896 as swamp land. As the claims of the appellants depend on the nature of the so-called lake, and the manner in which the water therein has receded or disappeared, it will be necessary to set out the facts in this respect as they appear from the record. There is practically no testimony of witnesses from personal knowledge as to the condition of the lake at the time of the government survey, but there is testimony showing substantially its condition from a time within ten years subsequent to the original survey down to the present time. About ten years after the survey, although previous to that time it had contained water, the so-called lake became practically dry during one season. Subsequently, it refilled with water; but around its margins, and during some seasons throughout its entire extent, with the exception of perhaps one or two places where there was considerable depth of water (at one of these deeper points there is still a so-called pond), it was grown up with rushes and grass. It was swampy in character—the bottom composed of prairie mud and a peaty substance. It ¹⁵⁵ had no definite shore line, but the ground around it sloped gradually down to and under the water. When full of water, the depth over its entire extent, with the exception of the one or two deeper places above referred to, did not exceed five or six feet, and it was shallower in the central portion, its greatest depth being along its sides. It had no springs or other subterranean sources of water supply, nor did it have any definite inlet, the water coming into it in the wet season from the general surface drainage of the surrounding country. It had a shallow outlet, called a creek, through which water flowed from it when it was filled. This remained its substantial condition, so far as observed by witnesses, for about twenty years after it had become dry, within ten years of the survey; and after this period of twenty years the water became shallower, and it was less frequently filled, until about fourteen years before the bringing of these suits, when it became practically dry. At the present time, owing to the cultivation of the

surrounding country, the surface water does not drain into it. Some of the witnesses liken it to ordinary prairie sloughs or ponds, save as to its greater extent. Within the memory of witnesses, the water has never, for any length of time, at least, come out to the meander line.

With the foregoing general statement of facts in mind, we think it unnecessary to follow counsel for plaintiffs in their discussion of the law of accretion or reliction. No doubt, the riparian owner adjoining a navigable river or lake may have his land extended by imperceptible additions thereto, or by like imperceptible recession of the water therefrom; and we do not now question the correctness of the contention that the same principle is applicable to nonnavigable lakes: See *Boorman v. Sunnuchs*, 42 Wis. 233; *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23. But to furnish occasion for the application of the rules of law on these subjects, there must have¹⁵⁶ been in this case a lake, and the addition to plaintiffs' lands must have been gradual and imperceptible. Where the abutting proprietor owns the title to the bed of the lake, as he does in some states, it is, of course immaterial when or how the shore is enlarged or the water recedes: *Grand Rapids etc. R. R. Co. v. Butler*, 159 U. S. 87, 15 Sup. Ct. Rep. 991; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669, 31 N. E. 865. But in this state the title of abutting owners on waters which are meandered is held to extend only to high-water mark, the title of the bed being in the state: *Wood v. Chicago etc. R. R. Co.*, 60 Iowa, 456, 15 N. W. 284; *Serrin v. Grefe*, 67 Iowa, 196, 25 N. W. 227; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250. As to whether, under a patent from the United States, the title extends to the center of a stream or lake, or is limited to the margin thereof, is held by the United States supreme court to be dependent on the law of the state: *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808. Therefore, unless the land held by each of the plaintiffs under title from the federal government was added to by accretion or reliction, as against the state, their respective rights of ownership have not been extended beyond the boundaries fixed by the original patents.

It is enough to say in the present case that there is no evidence of accretion or reliction. It does not appear that the drying up of the water of the lake resulted in gradual and imperceptible increment to the lands of plaintiffs. It is perfectly clear that the water did not slowly recede to a different shore line surrounding a remoter body of water, which further sub-

sequently disappeared, extending the titles of the surrounding owners to the center, for the testimony all shows that the lake was shallower in the center than in some of its portions near the original margin line. In short, there is a total want of such evidence as has been held sufficient in the cases on the subject to show imperceptible additions, enlarging the areas of land ¹⁵⁷ owned by riparian proprietors: *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518; *St. Clair Co. v. Lovington*, 23 Wall. 46; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581; *Murry v. Sermon*, 8 N. C. 56. The question we are now considering is practically controlled by the conclusion of the court in *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250, which was analogous, save in that the lake was rendered dry within a year by drainage; but the recession of the water from the land was no more sudden during the year during which the lake there considered was drained than it was in this case when the lake became dry for the last time. The insuperable difficulty with plaintiffs' claims, under the doctrine of accretion or reliction, is that there is no evidence to support them: See *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242.

From what has already been said, it is apparent that there was at the time of the original survey no lake, in the proper sense of the term, such as to give occasion for the application of the doctrines of accretion and reliction. While the evidence does not go back to the exact situation of affairs when the survey was made, it does indicate the general nature of this body of water at a time so proximate to the date of the survey as to enable us to know with sufficient definiteness what its character was at that time. It could not have been materially different from that subsequently existing, for the extent and depth were determinable by the outlet. This outlet, it is true, has within a few years been to some extent deepened or cleaned out, but not until the bed of the lake had become practically dry, the object of the drainage being to draw off more quickly the surface water temporarily accumulating from excessive rainfall.

¹⁵⁸ But it is contended for plaintiffs that the character of the body of water was determined by the surveyor in meandering it, and that the approval of his survey by the United States land department constituted an adjudication which cannot now be questioned. The rule under which the surveyor acted was

as follows: "You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres and upward; also navigable bayous; shallow ponds readily to be drained or likely to dry up are not to be meandered": Lester's Land Laws, ed. 1860, p. 714. But the action of the surveyor in meandering the shore line of the supposed lake cannot make it a lake unless it is one. We have held that if, by evident mistake on the part of the surveyor, a meander line is run where there is no body of water proper to be meandered, the title of the owners of lots or fractional subdivisions on the meander line does not extend beyond: *Schlosser v. Cruickshank*, 96 Iowa, 414, 65 N. W. 344; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842. As to whether the land within meander lines is swamp land or not is not conclusively settled by the act of the surveyor: *Reed v. Wallace*, 109 Iowa, 5, 79 N. W. 449. And in general, to the effect that the running of the meander line does not conclusively establish the character of the area beyond the meander line, as to whether it is river, lake, marsh, or unsurveyed land, see *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. Rep. 124; *State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. Rep. 379; *Kean v. Roby*, 145 Ind. 221, 42 N. E. 1011.

It is true, the meander line is not a boundary line, in a strict sense, and that if the surveyor does meander a body of water constituting a lake, which is proper to be meandered, then the title of the purchasers of the adjoining lots or fractional divisions extends to the actual water line; but if there is no body of water corresponding to the meander line, to which the ownership of the holders of the adjoining subdivisions can extend, then the meander ¹⁵⁹ line limits the extent of the land conveyed. We conclude, therefore, that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line, and that the tracts of land thus conveyed by the government have never been extended by accretion or reliction so as to include any portion of the bed of this supposed lake.

What we have already said practically disposes of plaintiffs' claims by adverse possession of portions of the lake bed. Whether the title to the bed remained in the United States or passed to the state, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign.

With reference to defendant's claims, set up in his two cross-petitions, under which he asserts ownership under conveyance of the bed of the lake as swamp land, it is enough to say that he does not show any selection of the land by the proper department of the federal government, or recognition by it of the land as passing under the swamp land act. No doubt, the swamp land grant was a grant in praesenti, but the passing of title under the grant depends on a question of fact, which cannot be adjudicated by the state and its grantees for themselves. The determination as to whether the land is swamp land must be, in the first instance, by the proper department of the federal government; and, until some determination has been made, the grantee claiming under the swamp land grant has only at best an inchoate right, not amounting to a title. This has been settled in a case recently decided in this court: See *Ogden v. Buckley*, 116 Iowa, 352, 89 N. W. 1115. Under the rule announced in that case, we cannot grant to defendant any affirmative relief.

The decree of the lower court denying relief to either the plaintiffs or the defendant was right, and it is affirmed.

A Meander Line is not ordinarily regarded as a boundary, but sometimes it is so regarded where the land outside it is grossly in excess of that sold or where the body of water never existed in substantially the place indicated on the plat: *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380, 44 N. E. 286; *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139; *Security Land etc. Co. v. Burns*, 87 Minn. 97, 94 Am. St. Rep. 684, 91 N. W. 304; monographic note to *Allen v. Weber*, 27 Am. St. Rep. 59.

When the Government Meanders Lakes and ponds, and conveys the adjacent uplands, no title, in some of the states, passes to any part of the bed of the lake: *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250. See, also, *Mobile Trans. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402; and compare *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 30 Am. St. Rep. 669, 31 N. E. 865.

If Accretions come to the owners of lands bounded by a meandered lake, they take to the water's edge and follow its gradual recession; but if a large body of land is suddenly and perceptibly formed by reliction, it belongs to the state: *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380, 44 N. E. 286; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250.

SUTCLIFFE v. IOWA STATE TRAVELING MEN'S ASSN.

[119 Iowa, 220, 93 N. W. 90.]

WITNESSES.—Conversations Between Husband and Wife a short time before he was shot are inadmissible in an action to recover his life insurance. (p. 299.)

WITNESSES—Husband and Wife—Res Gestae.—Where a man is shot in the presence of his wife, what he did and said at the time concerning the shooting are considered parts of the res gestae, rather than communications between husband and wife, when, in an action on his life insurance policy, it is claimed that he committed suicide. (p. 299.)

INSURANCE—Suicide—Admissions of Assured.—The beneficiary in a life insurance policy, suing in her own right, is bound by the admissions of the assured, if a part of the res gestae, to the effect that he took his own life. (p. 300.)

WITNESSES.—The Mere Presence of a Physician does not render inadmissible the admissions of a wounded man concerning his suicide, when not made to the physician nor connected with his professional duties. (p. 300.)

Action to recover on a certificate of insurance, to which the defense of suicide was interposed. From a judgment for the defendant the plaintiff appeals.

John C. King and Ryan, Ryan & Ryan, for the appellant.

Wright, Hewitt & Wright, for the appellee.

221 LADD, J. Frank A. Sutcliffe shot himself in the left side between the ninth and tenth intercostal cartilages and about four inches from the median line, shortly after midnight, February 27, 1899, and died from the effects of the wound so inflicted the next day. The ball lodged in the left side of the spinal column, about two inches above the anus—eleven inches from the point of entrance into the body. His vest, shirt, and skin were powder stained, and powder had entered somewhat into the wound. He was at the time a member of the defendant association in good standing, and it is conceded that, unless he purposely took his own life, the plaintiff, as the beneficiary named in the certificate of insurance, is entitled to recover. Our only inquiry, then, is whether the defendant has established by a preponderance of evidence that death was by suicide. He had been married in December previous, and, with his wife, was living with his parents in Chicago, Illinois. His wife had but recently obtained a divorce from a former husband, who seems to have found his way to the penitentiary,

though an improper intimacy had existed between them for more than two years. He was a commercial traveler, had returned to the city the morning of the 26th, and had spent the afternoon and evening with his wife about the city. According to her story, they had visited several saloons, drinking together, he imbibing two or three quarts of beer and a couple of glasses of whisky, though in her affidavit, made near the time, she declared he took no more than "two beers." She also testified that they had talked of disagreeable things, and that he had accused her of infidelity and want of affection. Such evidence, as it was of communications between husband and wife, is prohibited by statute: *Hertrich v. Hertrich*, 114 Iowa, 643, 87 N. W. 689.

Of their return she testified that: "My husband opened the door. We went in the house. Went upstairs ~~222~~ together, and I went in my room, and he came in directly behind me, removed his overcoat, and hung it up just inside of our room door, and hung up my umbrella with his coat. He turned round, and walked out of the room. Just outside of the room door my trunk sat. On that was his grip. He walked to his grip, and I was undressing in the room. As he stepped back into the room, I immediately turned round, and he just put the revolver to the left side, pulled the trigger, and I turned so quickly that he fell in my arms, and I laid him on the bed." That immediately his mother came into the room, followed a moment later by a sister, and accused her of having killed her son. That thereupon she inquired of deceased, "Who did it?" to which he responded, "I did it myself." That the mother then turned to him, and asked, "Who did this?" to which he answered, "I did it myself." That she again inquired, "Are you sure you did it, or did that woman do it?" to which he responded: "I did it myself, and don't blame my wife." Appellant insists that this testimony also should be excluded because of a communication between a husband and wife. We think the conversation had at the time a part of the *res gestae*, and what was said by the mother, wife and deceased in the nature of exclamations explanatory of what had occurred: *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *Wright v. Wright*, 114 Iowa, 748, 87 N. W. 709; *Alsever v. Minneapolis etc. Ry. Co.*, 115 Iowa, 338, 88 N. W. 841. They were spontaneous utterances, springing out of the transaction itself; verbal acts, as it were, rather than communications such as prohibited by statute.

The credibility of this witness is seriously shaken, if not destroyed, by her affidavits out of court, and repeated oral statement to the effect that she was not looking at deceased at the time the revolver was discharged, but turned as she heard the report, and caught her husband when falling toward her, and that she believed the shooting ²²³ accidental. Besides, she had been a prostitute since his death. Were she not strongly corroborated in the essential issue as to self-destruction, her testimony would be entitled to no consideration. A barber on the first floor heard the report, and notified the police. He then went to the scene, and inquired of deceased who did it, and was answered that the latter did. The police sergeant and a patrolman soon arrived, made the same inquiry, and received a like response. They then asked why he did it, and were told that it was none of their business. This evidence was objected to, first, because of the incompetency of declarations of deceased against the beneficiary. The latter claims in her own right, and not as representative of or through the assured: *Seiler v. Economic Life Assn.*, 105 Iowa, 87, 74 N. W. 941; *Rawls v. American etc. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280. This being true, the beneficiary is not bound by admissions of the assured, unless a part of the *res gestae*: *Fitch v. American etc. Ins. Co.*, 59 N. Y. 559, 17 Am. Rep. 372. But on this last ground we think the evidence rightly received. The conversations were so closely connected with the transaction in point of time and sequence that they should be treated as a part of it: *Alsever v. Minneapolis etc. Ry. Co.*, 115 Iowa, 338, 88 N. W. 841; *Harriman v. Stowe*, 57 Mo. 93; *Insurance Co. v. Mosley*, 8 Wall. 397; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727.

Appellant suggests that they should be rejected because of the presence of the physician treating deceased. The communications were not to him, nor in any manner connected with his professional duties. His mere presence alone did not render the communications confidential when not such in fact: *State v. Swafford*, 98 Iowa, 362, 67 N. W. 284.

But even were all these objections conceded to be well taken, the plaintiff proved precisely what these witnesses ²²⁴ testified to by Dr. Shepstone, and further that deceased had told Dr. Henderson, who operated on him at the hospital, that he "did it himself all right," and this without explanation to either of how it happened. This witness also testified that when the wife came for him immediately after the shooting she had urged him

to hurry, as they had accused her of shooting her husband, that he might make a search to see whether it was accidental or otherwise, and that as soon as they reached the scene she had said in presence of witness and mother, "Frank, who did it?" to which deceased responded, "I did it myself." As tending to confirm her statement that the mother had accused her as claimed, the policemen mentioned and another testified that plaintiff said to them, in substance, shortly after reaching the house, and subsequent to the arrival of the physician, that the wife had, by her conduct, driven deceased to do what he had done. It is true plaintiff denies this, and also insists that at the above interview the wife also asked deceased, "Was it accidental?" to which he answered, "Yes, but don't disturb me now."

The record does not bear out appellant's claim that the doctor's testimony confirms her statement that such a question was asked and answered. The inquiry was made, but he responded by repeating the question and answer first mentioned. In response to an inquiry by him as to how it happened, at another time, no explanation was made. We are satisfied that Sutcliffe never intended to assert that the shooting was other than his voluntary act. Not only did he state repeatedly that he did it, but emphasized his personal responsibility for the act by saying he did it himself, and, when asked how or why, repelled the inquirers, who were interested in knowing, by informing them it was not their affair. That he refused to make any explanation under the circumstances is convincing proof that there was none to make.

²²⁶ The fact that Sutcliffe's wife informed the doctor immediately upon reaching his home that she had been accused of doing the shooting, and the scene upon their arrival at the house, as well as plaintiff's statement to the policeman, strongly confirms her story that she had been charged by the plaintiff with killing her husband, as she testified. Such an accusation was wholly inconsistent with plaintiff's testimony on the trial that she was standing in her bedroom door, opening into the parlor to the east of the sitting-room, saw deceased and his wife pass to their bedroom, saw him return and lean over and open his grip, and put his hands into it, whereupon she heard the report of the revolver, and saw him fall into his wife's arms. She had given testimony at the coroner's inquest, but made no mention of having seen deceased when the gun was discharged. She had made a sworn statement as part of the

proofs of loss, in which the particulars of the accident were called for, without the slightest intimation of having witnessed it. With her attorney and the physician who attended deceased, she had been present when the wife, at the attorney's requests, had rehearsed the occurrences of that fatal night, without a suggestion of any knowledge on her part.

Moreover, it is difficult to understand how the ball could have taken the course it did if the revolver discharged accidentally while lying or being removed from the satchel. It was, when closed, less than twelve inches high, and the top of the trunk was but fourteen and one-half inches from the floor. Deceased stood a trifle less than six feet in height, and, when leaning over the grip his body must have been at least a foot above the top of the grip, and double that distance from the bottom. How was it possible for the ball to take the range it did unless the revolver was much higher than likely in merely handling it within the satchel? It is said the ball might have ²²⁶ deflected. Possibly, but there was nothing to indicate that it had. The wife's account is the more probable, is absolutely consistent with all the established facts of the case, and especially with deceased's conduct and remarks up to the time of his death. It should be added that in support of plaintiff's theory the deputy coroner declared that in about five hundred cases of suicide investigated within three years one-half had died from gunshot wounds, all of which save one had been inflicted in the head, and that one in the heart. It also appeared that deceased was intelligent, and likely to know where to shoot in order to avoid subsequent agony. But it will be recalled that, if the wife is to be believed, he had been drinking heavily.

This, with possible nervous tension, may account for lack of precision in what he did. At any rate, the unlikely often happens, and, in view of the other proof, we are convinced that insured took his own life.

Affirmed.

Bishop, C. J., took no part.

Res Gestae are the *Circumstances*, facts, and declarations that grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. Exact concurrence in point of time is not essential; in fact, time is not necessarily a controlling element in the matter of *res gestae*: *Elder v. State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, and cases cited in the cross-reference note thereto; *Coffin v. Bradbury*, 3 Idaho, 770, 35 Pac. 715, 95 Am. St. Rep. 37, and cases cited in the cross-reference note thereto; *Honeycutt v. State*,

42 Tex. Cr. Rep. 129, 96 Am. St. Rep. 797, 57 S. W. 806; monographic note to *People v. Vernon*, 95 Am. Dec. 51-76.

Privileged Communications between husband and wife are considered in the monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 411-423; and the subsequent cases of *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, 49 Atl. 10; *Knight v. State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928.

TRUTH LODGE NO. 213, A. F. & A. M., v. BARTON.

[119 Iowa, 230, 93 N. W. 106.]

JOINT OWNERSHIP by an Individual and a Society.—If a lot is conveyed to an individual and a society, the latter being unable to acquire legal title because unincorporated, and a building is erected under an agreement that each shall build and own a certain portion, and thereafter the society holds continuous possession of its part of the building, claiming one-half of the lot, and finally becoming incorporated, a grantee under a deed from the individual alone, which excepts the portion of the building owned by the society, takes with notice of the society's claim. (p. 306.)

DEEDS—Successor in Interest.—An admission in the pleadings that a party is the "successor" of an unincorporated society should be construed to mean "successor in interest," and there is no need of introducing evidence on the subject. (p. 307.)

ADVERSE POSSESSION.—In the Absence of Exclusive Possession of the entire property, a claim of title by adverse possession is without merit. (p. 308.)

PARTITION of Building and Lots by Sale.—If parties own land jointly and the building thereon severally, a partition of the property by sale may be decreed. (p. 309.)

Suit in equity for partition. The court found the parties to be owners of certain parts of the property, confirmed their interests therein, and denied partition. Both parties appeal.

Andrew Miller, for the defendant.

Butler & Hatch and George D. Peters, for the plaintiff.

²³¹ **DEEMER, J.** In February of the year 1871, one Stilson was the owner of lot 7, block 48, in Forest City. He conveyed the premises by warranty deed to B. A. Plummer and an unincorporated society known as Truth Lodge, No. 213, of Forest City, Iowa. On April 11, 1878, B. A. Plummer conveyed the premises, except the second story of the building situated thereon, by warranty deed, to J. A. Plummer. March 13, 1885, J. A. Plummer conveyed the entire premises, except the second story, to defendant, Barton, by warranty deed. On June 20,

1871, and while he was yet the owner of the lot, B. A. Plummer entered into a contract with Truth Lodge, the material parts of which read as follows: "That said parties hereby mutually agree that they will build a brick building on the southwest ²³² corner of block No. 48 in Forest City, Winnebago county, Iowa, the land being owned by both of the said parties jointly. The said B. A. Plummer hereby agrees to build and complete, and is to be the absolute owner of the basement, to be built firmly and of stone, also the first story of brick (walls to be one foot thick), by the first day of September, A. D. 1871, excepting an entry four feet wide, and space sufficient for one flight of stairs, in the first story for the lodge, stairs to be built and owned by the lodge aforesaid, in the northwest corner of said first story. The said lodge aforesaid agrees with said Plummer to build the second story of said building, and is to be absolute and unqualified owner of said second story, and all above it, to the highest heaven, excepting one-half of the roof, to be built by said Brook A. Plummer; the other half of said roof to be built by the said lodge, the said lodge to build and complete on their part by the last day of October, A. D. 1871." Pursuant to this contract, a building was erected upon the lot as therein contemplated. Truth Lodge remained an unincorporated body until some time in the year 1882, when it was duly incorporated under the general incorporation laws of the state.

This action was brought on the theory that plaintiff and defendant were and are tenants in common of the entire property. Defendant denies joint ownership, and claims that he is the owner of the lot and the first story of the building, for reasons which will hereinafter be stated. The trial court found that the plaintiff and defendant are the owners in severalty of the building—the plaintiff being the owner of the second story, the stairway and one-half of the roof, and the defendant being the owner of the basement, first story, and one-half of the roof—and that the parties were tenants in common of the land covered by the building, each owning an undivided one-half interest therein in fee simple; that, by reason of the contract to which we have referred, neither party was entitled to ²³³ partition. As the building does not cover the entire lot, the trial court found that plaintiff and defendant were and are tenants in common of the property not so covered, each owning an undivided one-half interest therein. Neither party seems to be content with the decree, and both appeal.

That the decree may be fully understood, it should be stated that after the building was erected it was discovered that it stood some eight feet over the south line of the block, and into what is known as "J street," in Forest City, and that the city council vacated eight by sixty feet of this street, and on September 20, 1881, conveyed the same to E. L. Stilson. Thereafter, and on September 20, 1886, Stilson conveyed this tract to Truth Lodge and Myron Barton, the parties to this litigation. The conveyance by the city to Stilson was legalized by an act of the legislature: See Acts 21st General Assembly, c. 82. Mention should also be made of the fact that the building first erected under the contract heretofore set out, which was a solid brick structure, was during the year 1885 largely torn down, and a new, veneered building, of about the same size, was erected by the parties to this litigation in its place, the defendant constructing the basement and first story, and one-half of the roof, and plaintiff the second story, the stairway, and one-half of the roof. During all the time when there was a building on the lot, the parties were in possession of the property—plaintiff of the second story and stairway, and defendant of the first story and basement.

Defendant contends that as Truth Lodge was an unincorporated society at the time the deed was made to Plummer and the society, it could not hold the legal title to the property, and that, in consequence, Plummer held the legal title to the entire premises, but was in fact trustee of an undivided one-half interest therein for the individual members of the lodge. He further claims that J. A. ²³⁴ Plummer was a purchaser in good faith, and without notice of the trust character of the estate held by B. A. and that he took title discharged of the trust which he conveyed to defendant. He also contends that by and through the contract between B. A. Plummer and the lodge he became invested with the legal title to all of the lot covered by the building, if not to the entire premises.

Defendant also argues that by the mere act of incorporating Truth Lodge did not succeed to the rights of the individual members of the unincorporated society, and that, under the record as it is presented to us, plaintiff has no claim to any part of the property, save the second story, stairway, and one-half of the roof. He also contends that he holds title by adverse possession, that the conveyance by Plummer amounted to an ouster, and that his possession, with that of his grantor, has been adverse and hostile to plaintiff, and for such length of time

that title has ripened in him to all the land by reason of the statute of limitations. Estoppel is also relied upon, due to plaintiff's failure to claim any interest in the property, although aware of the conveyances we have mentioned. These are the propositions presented for our consideration by defendant's appeal. Plaintiff, on its appeal, insists that, on the facts recited, its prayer for partition of the real estate should have been granted.

As to the first point made by defendant, we may concede that the unincorporated society could not take legal title to real property, that B. A. Plummer held the entire legal title under the conveyance from Stilson, and that an undivided half thereof he held in trust for the members of the unincorporated society. We may also concede that neither J. A. Plummer nor defendant had any actual notice of the alleged trust. But it does not follow that as such purchasers they took absolute title to the real estate. The conveyance under which B. A. Plummer²³⁵ took title gave notice that Truth Lodge, incorporated or unincorporated, had some interest in the property. If incorporated, it was the owner of an undivided one-half interest, as shown by the records. If unincorporated, then Plummer's trusteeship is apparent. Aside from this, however, it is shown without dispute that plaintiff, as an unincorporated, and incorporated society, has been in possession of the second story and stairway of the building, claiming ownership for one-half the lot, during all the time since the building was erected, except when it was in process of repair or reconstruction. These facts were sufficient to put defendant and his grantors upon inquiry, and gave him constructive notice of plaintiff's claim: *Rogers v. Hussey*, 36 Iowa, 664; *State v. Shaw*, 28 Iowa, 67; *Mosle v. Kuhlman*, 40 Iowa, 108; *Stewart v. Chadwick*, 8 Iowa, 463; *Ryan v. Doyle*, 31 Iowa, 53; *Nolan v. Grant*, 51 Iowa, 519, 1 N. W. 709.

The joint ownership of that part of the property which was at one time a part of J street must be conceded. At the time the deed from the city was made, plaintiff had become an incorporated body, and was capable of holding title to the land conveyed. This conveyance was also legalized, and there is no possible ground for saying that defendant holds the entire title to this tract.

The second point made by defendant is also without merit. The contract which we have set forth does not pretend to be a conveyance of the property. It expressly recites that the parties are joint owners of the land, and was made for the very evi-

dent purpose of fixing the parties' rights in and to the building which they were about to erect. The words "and all above it, to the highest heaven," might be construed to be a conveyance to plaintiff of the upper end of a pyramid of ethereal space, but there are no words which by any known process of construction can be tortured into a conveyance of the land to ²³⁶ Plummer. The basement referred to is that which was to "be built firmly and of stone," and the first story was of "brick (walls to be one foot thick)." Surely this does not refer to real estate, other than that thus described. There was no attempt to partition the lands, but simply the building, and there is no merit in the claim that this contract amounted to a relinquishment by plaintiff of its interest in the land.

The next point is equally futile. Concede, for argument's sake, that Plummer held an undivided one-half interest in the property in trust for the individual members of Truth Lodge, as claimed, yet it does not follow that defendant is entitled to a decree for the entire land. It is admitted in the pleadings filed by defendant that plaintiff is the successor of the unincorporated association described as Truth Lodge No. 213, A. F. & A. M. As applied to this case, and as stated in the pleading itself, this should unquestionably be construed to mean successor in interest. This was admitted by the plaintiff in its reply. In view of these admissions, there was no need of introducing any evidence on the subject; and we think it is fairly shown that plaintiff is the successor in interest of all the property held by the unincorporated society, and, of necessity, of all the property belonging to the individual members thereof. And from this we think plaintiff has good title to the lots under the deed: *Methodist Episcopal Church v. Conover*, 27 N. J. Eq. 157; *Organized Labor Hall v. Gebert*, 48 N. J. Eq. 393, 22 Atl. 578.

The claim of adverse possession is also without merit. During all the time since the building was constructed, plaintiff and its predecessor have been in possession of the upper story of the building, claiming to own one-half of the lot. It has unquestioned title to part of it through the legalized conveyance from the city. Plummer's conveyance of the whole of the ²³⁷ property doubtless was a constructive ouster, but, as a matter of fact, there has been no actual ouster. Neither defendant nor his grantors have been in the exclusive possession of the entire property. As to the part received by conveyance from the city there has been no ouster, either actual or constructive, and plaintiff's

continued possession saves the case from the claim of adverse possession. There were times when the Plummers and Barton claimed ownership of the entire lot, but their claims were treated as a jest by the plaintiff and its officers, as well they might be, so long as they retained possession and asserted ownership. As neither defendant nor his grantors have had exclusive possession of the lot, there is manifestly no merit in the claim of title by adverse possession: *Smith v. Young*, 89 Iowa, 338, 56 N. W. 506; *Burns v. Byrne*, 45 Iowa, 285.

The claim of estoppel is without any support in the evidence. Defendant has not changed his position by reason of any statement made by plaintiff. Indeed, plaintiff has made no statements, except to claim ownership of one-half of the land. So long as it retained possession, it was under no duty to the grantees of Plummer, who undertook to convey the whole title to the lot. It could rest secure on that possession, and was not bound to settle any extravagant claims made by defendant or his grantors. Plaintiff has not been guilty of laches, and the case is destitute of any of the elements of estoppel.

This disposes of defendant's claims, and we now turn our attention to plaintiff's appeal.

2. Plaintiff and defendant are joint owners and tenants in common of all that part of the real estate acquired from the city. They are also such owners of all of lot 7, exclusive of the building thereon. They own the building in severalty as heretofore stated. This building was erected under the contract hitherto recited. Partition of the property ²³⁸ owned in common was denied because of the condition of the property. Plaintiff concedes that the authorities hold that the owners of real estate in severalty cannot have partition, that owners who have had one partition cannot have another, that partition will be denied owners who have agreed not to partition their property, and possibly that owners may waive partition, but contends that in the case at bar none of these situations are present. The parties are owners in severalty of the building, but not of the land. They have not made voluntary partition, unless the contract to which we have referred should be treated as a separate allotment of an aliquot part of the real estate to each of the parties. They have not expressly agreed not to make partition, and, if there be any agreement of this kind, it is to be inferred from the facts stated; and, if there be a waiver, it is also to be found from these facts. The contract,

as we have seen, did not constitute a voluntary partition. As we construe it, it had reference simply to the improvement which was to be placed upon the lot, and should be given no greater force and effect than if there had been two separate structures erected on the land, each cotenant erecting under an agreement that he should be the owner thereof. There is nothing in the agreement with reference to continued occupancy.

Moreover, the building as it now stands was not erected under the contract. The original building was torn down and this one erected in its place. True, the parties contributed to the expense in the same proportion as they did to the old one, but there was manifestly no voluntary partition of the property in the erection of the new building. The property is not, of course, partible, but that in itself is no ground for denying the relief sought. Sale may be made, and a decree entered which will protect the rights of both parties. It will not be difficult to ascertain the amount invested by each in the building and in improvements, and no reason appears for ²³⁰ not ordering partition by sale. The mere fact that such procedure will be inconvenient, injurious, or even ruinous, has been held to be no defense: *Hanson v. Willard*, 12 Me. 147, 28 Am. Dec. 162; *Bradley v. Harkness*, 26 Cal. 77; *Lake v. Jarrett*, 42 Ind. 395; *Hartman v. Hartman*, 59 Ill. 103.

As said by Freeman in his work on Partition, second edition, section 438: "We think that, if any species of corporeal property is not now subject to proceedings for compulsory partition, it embraces only those things the division of which would be against public right or policy, or would tend to impair some paramount right existing in a stranger to the cotenancy, or would outrage the public sense of propriety, decency, and good morals": See, also, *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398. Our conclusion on this branch of the case is sustained by *Leighton v. Young*, 3 C. C. A. 176, 52 Fed. 439; *Fisher v. Dewerson*, 3 Met. (Mass.) 544. The result reached is not in conflict with *Johnson v. Moser*, 72 Iowa, 523, 34 N. W. 314. There the parties were owners in severalty of certain parts of a building which covered an entire lot. The parties did not, as here, own the real estate jointly.

The decree on defendant's appeal is affirmed, and on plaintiff's appeal it is reversed.

Partition may be by sale and division of the proceeds, in a proper case: *Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276, and cases cited in the cross-reference note thereto. A cotenant in

animals may enforce a division thereof: *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, 61 N. E. 993. See the monographic note to *Nichols v. Nichols*, 67 Am. Dec. 703-712, on who may compel partition. In general, partition is a matter of right: *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 571, 60 N. E. 493.

ROWELL v. WEINEMAN.

[119 Iowa, 256, 93 N. W. 279.]

BOUNDARIES—Government Survey.—The Lines actually run by the original government surveyors become the true boundaries, and, if they can be ascertained through the monuments they will control; and courses, measurements, plats, and field-notes must yield. (p. 311.)

BOUNDARIES—Evidence of Where Monuments were.—In determining where monuments were established by the government surveyors, it is proper to consider the testimony of persons who saw them when discernible, evidence of their practical location at a time when presumably in existence, acquiescence of the parties concerned, acts of public authorities, boundaries of contiguous tracts, and reputation and tradition. (p. 312.)

BOUNDARIES—Estoppel of Vendor to Deny.—If the owner of land points out the boundaries, and his vendee purchases believing them to be correct, the vendor is thereafter estopped to insist that they are incorrect and should be re-established in accordance with government plat and field-notes. (p. 313.)

Suit to quiet title to the north half of section 2, township 97, range 35. Defendants Daniels and Leary deny the plaintiff's ownership, claim title to the land as a part of the south half of section 2 of the above township and range, and plead adverse possession, acquiescence in an established boundary, and estoppel. From a decree dismissing the petition and quieting title in the defendants, the plaintiff appeals.

Cornwall & Martin, for the appellant.

Buck & Kirkpatrick and Healey Brothers & Kelleher, for the appellees.

257 DEEMER, J. Plaintiff is the owner of the north half of the section above described. He obtained title to the northeast fractional quarter of the section October 27, 1894, by deed from C. W. Carpenter and wife, and to the northwest fractional quarter on December 10, 1895, through a sheriff's deed under foreclosure of a mortgage made by one Ostrander to the J. L. Case Threshing Machine Company, which mortgage was as-

signed to plaintiff's wife, and afterward foreclosed by her. Defendants Daniels are the owners of the west two hundred acres of the west two hundred and eighty acres of the south half of section 2, having acquired their title December 1, 1893, by conveyance from Sevdý and wife. Defendant Leary is the owner of the east seventy-one and twenty-five hundredths acres of the southeast quarter and the east eighty acres of the west two hundred and eighty acres of the south half of ~~258~~ section 2, having acquired his title April 24, 1894, from the plaintiff, Rowell. The real controversy is over the lines and boundaries between these tracts of land, and the case in most of its aspects is like *Rowell v. Clark*, 119 Iowa, 299, 93 N. W. 280. The north half of section 2 is fractional according to the government survey, but, if we follow the field-notes and plat made by the government surveyors, we must hold that the quarter corners common to sections 2, 3, 4, and 5 and the section corners along the south sides of these sections are at or near where plaintiff claims them to be, and render a decree for him, unless it be for some of the affirmative defenses pleaded by the defendants, which have already been stated in a general way.

But it is well settled that the lines actually run by the original government surveyors become the true boundaries and, if they can be ascertained through monuments erected by these officials, they will control; and courses, distances, measurements, plats, and field-notes must all yield: *Ufford v. Wilkins*, 33 Iowa, 112; *Sayers v. City of Lyons*, 10 Iowa, 249; *Root v. Town of Cincinnati*, 87 Iowa, 204, 54 N. W. 206. It is well known that the original surveys were faulty in many respects, and that they will not stand the test of careful and accurate retracing. It is not the purpose of such actions as this, or of any other, for that matter, to straighten out lines, or to remove unsightly crooks, however desirable such a result might be: *Rallins v. Davidson*, 84 Iowa, 237, 50 N. W. 1061. Hence, everything yields to known monuments and boundaries established by the government surveyors.

The primary inquiry in the case is, Have the corners and boundaries as established by the government surveyors been sufficiently shown? It must be conceded that these monuments, which were artificial, have now to a large extent been obliterated; but in determining where they were we may consider ~~260~~ not only the testimony of those who saw and identified them when they were discernible, but evidence of practical location made at a time when they (the monuments) were pre-

sumably in existence (*Deihl v. Zanger*, 39 Mich. 601; *Stewart v. Carleton*, 31 Mich. 270), acquiescence of the parties concerned in supposed boundary lines (*Joyce v. Williams*, 26 Mich. 332), acts of public authorities and the well-established boundaries of other contiguous tracts (*Baker v. McArthur*, 54 Mich. 139, 19 N. W. 923; *Whalen v. Nisbet*, 16 Ky. Law Rep. 52, 26 S. W. 188; *Williams v. Tschantz*, 88 Iowa, 126, 55 N. W. 202), and reputation and tradition is also to be considered in some cases: *Klinkner v. Schmidt*, 114 Iowa, 695, 87 N. W. 661.

A number of surveyors were called, who had run the lines and boundaries in dispute, and who testified to having found the original government corners common to sections 5, 6, 7, and 8, 3, 4, and 10, 2, 3, 10, and 11, and 1, 2, 11, and 12, and who stated that these corners were where defendants now claim them to be. Some of these surveyors were called to find out the difficulty with the lines, and one or more of them testified that they at that time found the field-notes grossly incorrect. The testimony also shows that improvements were made with reference to these corners, highways laid out, improved, and worked, bridges built, fences erected, schoolhouses constructed and lands tilled in accordance therewith. In some instances fences were erected on the lines thus established nearly thirty years ago. The evidence also shows that resurveys were attempted some years ago, and that the surveyors invariably found the field-notes inaccurate, and in many instances grossly incorrect.

On the face of the record it would be most unjust and inequitable to hold that all these corners and boundaries should now be changed to correspond with the plat and field-notes, which are clearly shown to be erroneous and incorrect. To do so would mean much more than a mere ²⁸⁰ decree for plaintiff in this particular case. It would necessitate the relocation of highways, the removal of schoolhouses and bridges—in fact an entire rearrangement of fences and improvements over the whole north end of the township. The chief difficulty in this case seems to lie in the fact that there is a deficiency of land in the township. This deficiency was, of course, according to the rules of the department, deducted from the western and northern sections or half sections of land in that township. We are constrained to hold that defendants have established the lines and boundaries claimed by them, and that the decree of the district court is correct.

Moreover, there can be no doubt as to defendant Leary's rights in the premises. He purchased his land from plaintiff; and at

the time of his purchase plaintiff, through his agent, pointed out the lines of his land and told him just where the boundaries were. Leary purchased believing that these boundaries were correct, and plaintiff is clearly estopped from now insisting that they were and are incorrect, and that a resurvey should be had, and the lines re-established in accord with the government plat and field-notes. No citation of authorities is needed in support of this contention. By agreement plaintiff established the boundaries as now claimed by the defendant Leary, and the case as to him is without merit, no matter where the true boundary may be. On the whole case we reach the satisfactory conclusion that plaintiff's claim is without merit, and that the trial court was right in dismissing the petition, and rendering a decree for defendants.

Affirmed.

In the Case of Rowell v. Clark, 119 Iowa, 299, 93 N. W. 280, "the issues as to the corners and boundaries of the land," to quote from the language of the opinion, "are the same as in the Weineman Case, and it was submitted on the same testimony. These two cases, with Brett v. Clark, were tried together on the same evidence so far as applicable. The point made by the appellant in these three cases is that the evidence as to the true boundaries and corners, as actually located and run by the government surveyors is not sufficient to overcome the plat and field-notes filed by them. It must be conceded that the evidence as to the true corners given by these witnesses, if true, shows some very bad surveying by these government officials; but it is well known that these original surveys were loosely made, and that but few, if any, of the early plats will stand the test of a careful and accurate resurvey. It must also be remembered that the trouble is found in the north quarter of section 4, just where we would, from the nature of things, and from the rules of the land department, be likely to find error. All parties agree that the quarter in question is fractional, and the difficulty lies in finding the exact corners and boundaries of plaintiff's tract. It is practically admitted that the surveyors called by him ran the lines in exact accord with the original plat and field-notes. They made their surveys in 1896, and do not claim, as we understand it, that they found any of the original government corners. Indeed, they did not investigate the mounds and corners claimed by defendants with a view to ascertaining their authenticity.

"Plaintiff is relying wholly on the government plat and field-notes, and did not attempt to otherwise meet the testimony offered by defendants as to the actual monuments and distances. Defendants offered the testimony of at least four surveyors, who had surveyed the two north tiers of sections in the townships in which plaintiff's land

is situated, some of them as early as in the year 1870, and who testified positively to having found the original government corners and monuments at the time their surveys were made, and that they were where defendants now claim them to be. They also offered at least nine other witnesses, who testified to having found and identified original corners and monuments, some of them as early as in the year 1871. These corners so testified to are where defendants now claim them to be. Surely, such evidence is more reliable than mere re-surveys made in the year 1896, according to the original plat and field-notes.

“Moreover, the record is full of testimony to the effect that highways were laid out and established, bridges built, farms cultivated and improved, and fences erected according to these corners and lines. This, of course, would not in itself estop plaintiff from claiming title to all the land actually owned by him, for reasons already stated. But as these improvements were made and highways established many years ago and at a time when the original monuments were presumptively, at least, plainly discernible, and as they seem to recognize, or at least accord with, the other evidence regarding the actual monuments, such facts are strongly corroborative of the other evidence in the case as to the actual boundaries.

“Accepting defendants’ testimony as true, it must be admitted, as we have already said, that there was some very bad surveying in this township. Some of the corners so established are something like eighty rods from where the field-notes indicate they should be, and plaintiff’s land, if governed thereby, instead of being a square, or in the form of a rectangular parallelogram, is markedly triangular and irregular in shape; that is to say, in the form of a rhomboid. But this is by no means conclusive, for the original plat and field-notes show that plaintiff’s land is not rectangular, nor in the form of a perfect parallelogram. If we were to indulge in presumption as to the cause of the difficulty, it would be found to be due, no doubt, to the presence of at least three large sloughs or lakes in the township, one of them covering nearly three sections of land, which were not actually chained or measured by the original surveyors. The hardships following a decree for plaintiff on the record before us have already been pointed out in the *Weinman* case, and need not be repeated here.”

In Determining Boundaries as fixed by surveys, monuments prevail over calls, courses, and distances, because more durable and permanent: *Note to Johnson v. Archibald*, 22 Am. St. Rep. 34; *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 South. 910; *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182, 23 South. 158. The original monuments, when ascertained, are satisfactory and conclusive evidence of the lines originally run, which are the true boundaries of the tract surveyed, whether they correspond with the plat and field-notes or not: *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696.

LONG v. WILSON.

[119 Iowa, 267, 93 N. W. 282.]

PUBLIC STREETS.—The Owner of Property Abutting on a public street has a right to an interest in the street distinct and different from that of the general public. (p. 316.)

JUDGMENT Against City—Whether Binds Citizen.—An owner of property abutting on a public street is not bound by a judgment against the city fixing the boundaries of the street so as to interfere with the use of his property, when he was not made a party to the suit. (p. 320.)

Giddings & Winegar, for the appellants.

White & Clarke and H. A. Hoyt, for the appellee.

²⁶⁷ LADD, J. The petition alleged that plaintiff acquired lots 5, 6, and 7 in block 3, abutting Fifth street, in Tyler's addition to Perry, in 1892, and shortly thereafter occupied them as a homestead for himself and family and has continued to do so since; that said street is seventy feet wide, and the only one through which plaintiff has convenient access to said property. It also averred facts which, if true, indicate that said street, through dedication, had become a public street of the city before defendants acquired block 4 of said addition in November, 1900, and that they have since encroached on said street by erecting a dwelling-house, building a fence, and planting shade trees up to within thirteen feet of the east line of plaintiff's lots, and threaten by other obstructions to prevent the use of all the said street, save said strip thirteen feet wide along the east side of plaintiff's lots, and thereby interfere with his access to his property, and the comfort and enjoyment of it as a home, and greatly diminish its value. Plaintiff prayed that these obstructions be abated, and defendants enjoined from encroaching on said street. In the third ²⁶⁸ division of the answer the defendants aver that they acquired said block 4 (describing it) of the Security Investment Company of Baltimore, November 27, 1900; that prior to that time, December 19, 1899, said company commenced an action against the city of Perry to establish the boundaries of said block, and to quiet title against said city; that said city appeared and answered; that decree was entered as prayed, confirming the boundaries of said block as claimed by defendants. Copies of the pleadings and decree in that case were set out as part of the answer. To this division the plaintiff interposed a general demurrer and also that

the adjudication was not binding on plaintiff, as he was not a party to the action. The demurrer was sustained, and defendants appeal.

For the purpose of this case, the averments of the petition and third division of the answer must be treated as true. If so, then defendants are encroaching upon and obstructing the only street by which plaintiff has convenient access to his homestead abutting thereon. The defendants justify this by a decree in an action wherein their grantor was plaintiff and the city of Perry, within whose limits the property is located, was defendant, awarding said grantor all of said street, save a strip thirteen feet wide along the east side of plaintiff's lots, as a part of block 4 to the east, and belonging to them. Plaintiff was not a party to that action. Is he bound by the adjudication? As contended by appellant, the decree is binding upon all citizens of the city of Perry having no interest in the street, other than as individual members of the general public. The legally constituted authorities of the city stand for and instead of its citizens, and may be said to represent them in such litigation: *Clark v. Wolf*, ²⁶⁹ 29 Iowa, 197; *Lyman v. Faris*, 53 Iowa, 498, 5 N. W. 621; *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Dicken v. Morgan*, 59 Iowa, 157, 13 N. W. 57. This is not questioned. What appellee contends is that, as owner of the property abutting on the alleged street, he has a right to and interest in the street distinct and different from that of the general public. This doctrine has been expressly recognized in this state: *Cook v. City of Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Warren v. City of Lyons*, 22 Iowa, 351. The authorities are practically agreed to the same effect: *Elliott on Roads and Streets*, sec. 877.

It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally; and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value—and it is of value if it increases the worth of his abutting premises—then it is property, regardless of the extent of such value.

Surely no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value.

Under the allegations of the petition, then, shutting off the approach to plaintiff's homestead was the taking of his property, and of this there has been no adjudication: *Haynes v. Thomas*, 7 Ind. 38; *Lackland v. Railroad Co.*, 31 Mo. 180; *Bradbury v. Walton*, 94 Ky. 167, 21 S. W. 869; *Heller v. Railroad Co.*, 28 Kan. 625; *Heinrich v. City of St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626; *Bannon v. Rohemeiser*, 90 Ky. 48, 29 Am. St. Rep. 355, 13 S. W. 444; *Abendroth v. Railway Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 25 N. E. 496; *Cincinnati etc. St. Ry. Co. v. Incorporated Village of Cumminsville*, 14 Ohio St. 523; *Anderson v. Turbeville*, 6 Cold. 150. As said in *Heinrich v. City of St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626: "There is no doubt but a property owner has an easement in a street upon which his property abuts which is special to him, and should be protected. While the owner of a lot on a public street has the same right to the use of a street that rests in the public, he at the same time has other rights which are special and peculiar to him, and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage his property, and when this is done for the public good the public must make just compensations."

We are not questioning the power of the legislature, through the municipality, to vacate streets. That has been fully recognized by this court: *McLachlan v. Town of Gray*, 105 Iowa, 259, 74 N. W. 773, and cases cited. Conceding such power, it does not follow that it may be exercised without compensating abutting owners for the damages occasioned thereby. *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Rep. 649, and *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237, are often cited as announcing that compensation cannot be exacted in event of the vacation of a street. Although the opinions broadly state this, it is to be observed that they were causes in which the municipalities were sought to be enjoined from exercising the power to vacate, and did not necessarily involve the right of the abutter to recover damages. The power to vacate, as we think, does not necessarily depend on the absence of the right to recover damages for the taking of private property. Damages might be awarded in a subsequent action.

But these cases are to be further distinguished, in that the public had but an easement, and the vacation amounted to no more than a surrender of this to the owner ²⁷¹ of the fee. They seem in this respect to be in harmony with our own decisions relating to the vacation of a country highway. In deciding this question, the court, in *Brady v. Shinkle*, 40 Iowa, 576, said: "That a land owner may sustain damage according to the common acceptance of the word on account of a vacation of a highway, as stated in the question, cannot be doubted. It is equally true that inconvenience and damage may result to him by closing a road which is miles away from his land. A farmer may suffer serious loss and inconvenience by the vacation of a highway over which he is accustomed to travel and haul the productions of his farm to market, though his land abuts upon no part of it. All who use the road suffer in the same way. While one may be more largely injured than others, he yet sustains damages of the same character and nature which all who use the road—the public generally—suffer. While the road exists, he has a right to the easement. But this right is not different from that enjoyed by the public generally. His right, then, is such as is enjoyed by the public. His damages are those shared by the public, and no other": See, also, *Grove v. Allen*, 92 Iowa, 519, 61 N. W. 175; *McKinney v. Baker*, 100 Iowa, 362, 69 N. W. 683. This is the prevailing rule: *Levee Dist. v. Farmer*, 101 Cal. 178, 35 Pac. 569; *State v. Board of Commissioners of Deer Lodge Co.*, 19 Mont. 582, 49 Pac. 147. See, contra, *Pearsall v. Supervisors*, 74 Mich. 558, 42 N. W. 77.

In the vacation of an ordinary highway outside of a city or town, all that is done is to yield control of the easement in the land, and the right of exclusive possession passes to the owner, to be occupied as a private way, or otherwise, as he pleases. Its discontinuance does not of necessity cut off access to his property. The public merely ceases to keep up and repair the strip of land as a highway. The situation, although analogous in some respects, is different with a town or city street. The abutting lot ²⁷² owner cannot complain if the street be left in precisely the same condition as a country road. The municipality owes him no legal duty of improving it. Upon its vacation, however, the fee remaining in the city or town may be devoted to whatever purposes it may choose, and hence access be entirely cut off. It may be diverted absolutely from the purposes for which dedicated, and this brings us to the main

distinction between a country highway and a street. The former is established by law for the public, the owner usually being paid value for a mere easement in his land, though there may be gratuitous dedication. Title to the streets of a city or town is acquired by grant with the implied right of ingress and egress in the abutting lot owner, the grantor or the party making the dedication of the city or town saying to him, "This right of ingress and egress you shall have": *Bradbury v. Walton*, 94 Ky. 163, 21 S. W. 869. By accepting the street, the obligation to keep it open and afford the dedicator or his grantees, near or remote, access to abutting lots is clearly implied; and though, under the plenary powers of the legislature over all streets and highways, it may be vacated, the damages occasioned thereby cannot be said to be those shared with the public generally, as in the case of a country road, but are in large part peculiar to himself: *Anderson v. Turbeville*, 6 Cold. 150; *Seldon v. City of Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457; *Moose v. Carson*, 104 N. C. 431, 17 Am. St. Rep. 681, 10 S. E. 689; *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761, and cases previously cited; *People v. Marin Co.*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659, and note in which decisions are collected. Damages incident to the occupation of the street by a railroad are denied in the absence of statute, because the inconvenience occasioned thereby is shared in by the citizens generally. Nor do courts look favorably on claims based on the mere ²⁷³inconvenience arising from the closing of streets, when another approach remains: *Kings County etc. Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Fearing v. Irwin*, 55 N. Y. 486; *Dantzer v. Indianapolis etc. Ry. Co.*, 141 Ind. 604, 50 Am. St. Rep. 343, 39 N. E. 223. And no consideration will be given the claims of owners of land not abutting thereon: *Smith v. City of Boston*, 7 Cush. 254; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625.

The point involved was touched in *Barr v. City of Oskaloosa*, 45 Iowa, 275. The ruling there affirmed sustained a demurrer to a petition that, while alleging the vacation of the street, also asserted that access to the dwelling-house was greatly obstructed, not cut off. It was held that the city had the power to vacate, and that damages could not be recovered for the partial use thereof by the railroad; but in the course of the opinion, after referring to the statute, the court said: "This section clearly confers upon the city the power exercised in this case, and for

an exercise of this right the city cannot be made to respond in damages." But the case has not been treated in subsequent decisions as disposing of the question. Thus, in *Stubenrauch v. Nevenesch*, 54 Iowa, 567, 7 N. W. 1, it was mentioned and treated as open, but a decision of it expressly disclaimed, *Barr v. City of Oskaloosa*, 45 Iowa, 275, being cited. In *Williams v. Carey*, 73 Iowa, 194, 34 N. W. 813, the court said that the use of the street in Barr's case had not been diverted, but was "still devoted to a public use, different, possibly, from the one intended by the proprietor who laid out the town." The writer of the opinion had spoken for the court in *Cook v. City of Burlington*, 30 Iowa, 94, 6 Am. Rep. 649, and quoted with approval language from an Ohio case which so clearly expresses our conclusion that it will bear repetition: "The lot owners have a peculiar interest in the street, ²⁷⁴ which neither the local or general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contract and by law, and without which their property would be comparatively of little value. This easement appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

Having determined all necessary to a decision of this case, the question of liability for damages ought to be deferred until directly involved. It follows that, as plaintiff had an interest in the street apart and distinct from that enjoyed by citizens generally, the adjudication against the city of Perry was not binding on him, and the demurrer was rightly sustained: *Hine v. Keokuk etc. R. R. Co.*, 42 Iowa, 636.

Affirmed.

An Abutting Owner, in addition to his right with the public to the use of the street from end to end for passage, has an individual property right in the part of the street necessary to free and convenient egress and ingress to his premises: *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305, 63 N. E. 302; *Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626.

McFADDEN v. TOWN OF JEWELL.

[119 Iowa, 321, 93 N. W. 302.]

MUNICIPAL CORPORATION—Negligence of Employé.—If a city, in the exercise of its police power, employs a person to cut the weeds and grass in an alley, it is not answerable for his negligence in operating the mower whereby a child is injured. (p. 323.)

Action by an infant by his next friend. A demurrer to the petition was sustained. The plaintiff electing to stand on his petition, and refusing to plead over, judgment for costs was rendered against him, and he appeals.

Wesley Martin, for the appellant.

Hyatt & Hyatt and J. M. Blake, for the appellee.

321 BISHOP, C. J. The allegations of the petition are substantially as follows: That prior to July 15, 1899, a public alley within the limits of the defendant town had been allowed to become obstructed and grown up with weeds and grass; that on said day the defendant employed one Foster to mow and cut down such weeds and grass, and that said Foster, pursuant to his employment, and under the direction of defendant as to the means and manner of said employment, proceeded with the work for which he was employed, using therefor a mower drawn by a team of **322** horses; that the operation of the mower attracted to the alley a number of children from the homes near to and adjoining the same; that plaintiff, then about two years old, and residing with his parents near said alley, was attracted by the operation of the mower and by the voices of other children in the alley; that, as said Foster was driving south through said alley with his team and mower at work, the plaintiff entered the alley, and proceeded to walk north, so that the child and team were approaching each other from opposite directions; that from the time plaintiff entered the alley until he was injured, said Foster could have seen him by the exercise of ordinary care, and thus prevented the accident; that the children in the rear of the team and mower saw plaintiff, and one of them called loudly to Foster to attract attention, and that, while he heard the call, and asked the cause thereof, he paid no further attention thereto, and did not stop his team; that he, said Foster, negligently and carelessly drove said mower upon and against plaintiff, causing an injury, which is set forth and de-

scribed. It is then said that defendant was guilty of negligence in employing said Foster to mow said alley by the use of a team and mower, as plaintiff and other children were in the habit of playing therein, which fact, and of the danger to such children incident thereto, was well known at all times to defendant and said Foster. The demurrer in terms puts in issue the sufficiency of the petition as stating a case of actionable negligence on the part of the defendant.

Conceding, for the purpose of this opinion, that the petition states a cause of action as against Foster, we proceed to the inquiry whether a case of actionable negligence is stated as against the defendant town. It does not appear by whom—that is, by what official board or officer of the town—Foster was employed. Nor is it stated what were the terms of his employment, save that it is said he was under the direction of the defendant as to the means and manner of his ³²³ employment. The defendant being a municipal corporation, it follows of necessity that the contract of employment with him must have been entered into by some official board, committee, or officer. Now, whether it was the town council, or a committee thereof on public health or streets and alleys, or the street commissioner of the town, is immaterial, in our view. Certain it is that in the matter of its control over the streets and alleys within the incorporate limits—and, to make the reference direct, in the matter of clearing the alley in question of weeds—the town was in the exercise of police powers possessed by it as an incident to its existence as a municipal corporation.

It is well settled that where an act done by an officer or employé of a municipal corporation is essentially in the line of the performance of an official duty, public in character, the municipality cannot be made liable for a tort committed or wrong done by such officer or employé while engaged as such in the performance of the duty in question. That acts done in the execution of police powers and in the enforcement of police regulations are in the nature of the performance of a service for the benefit of the general public cannot well be questioned. In this connection it has been held that: "The grounds of exemption from liability are that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of

the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty ³²⁴ no action will lie against the city, unless expressly given; and hence the doctrine of respondeat superior has no application": *Hayes v. City of Oskosh*, 33 Wis. 314, 14 Am. Rep. 760. And in *Condict v. Jersey City*, 46 N. J. L. 157, it was held that, where a person was employed by the board of public works of a municipality to drive a horse and cart owned by such municipality, and used in carting refuse to the dumping-ground, and by the negligence of such driver in making a dump from such cart the plaintiff's intestate was killed, it was held the doctrine of respondeat superior had no application. And a city cannot be made liable for the negligence of a teamster employed in transporting stone to repair a highway, the employment being by the superintendent of streets, who is charged with the duty of keeping the streets in repair: *Barney v. City of Lowell*, 98 Mass. 570. An employé of the committee of public charity, an adjunct of the city government, charged with the duty of driving an ambulance wagon, and through whose negligent driving a person was struck and killed, has been held to be engaged in a public service, and hence the municipality could not be made liable under the doctrine of respondeat superior: *Maxmilian v. City of New York*, 62 N. Y. 160, 20 Am. Rep. 468.

So it has been held that a city cannot be made liable for the personal torts or wrongs committed by its police officers (*Calwell v. City of Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614); or its sanitary officers (*Ogg v. City of Lansing*, 35 Iowa, 495, 14 Am. Rep. 499); or its firemen (*Wilcox v. City of Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. 228). The general doctrine is that, unless the charter of the city, or some general statute of the state, impose a liability upon the city for the torts or wrongs of its officers and agents engaged in the execution of police powers or regulations, then no such liability exists: *Hafford v. City of New Bedford*, 16 Gray, 297; *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Dillon on Municipal* ³²⁵ *Corporations*, 4th ed., secs. 967, 974. Accepting such to be the rule, it follows that the court below committed no error in holding that the de-

fendant could not be made liable for the negligent act of Foster, and accordingly in sustaining the demurrer to the petition. Affirmed.

Weaver, J., took no part.

The Liability of Cities for the negligence and misconduct of their officers and agents is discussed in the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376-413; *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604, 47 Atl. 82, and cases cited in the cross-reference note thereto. A municipal corporation is not answerable for damages, other than those caused to property, by an act in pursuance of its legislative or judicial, or in the exercise of its police, power: *Williams v. Greenville*, 130 N. C. 93, 89 Am. St. Rep. 860, 40 S. E. 977.

FOLEY v. BROCKSMIT.

[119 Iowa, 457, 93 N. W. 344.]

FUNERAL EXPENSES—Implied Promise to Pay.—One who furnishes reasonable burial equipment should be allowed the value thereof from the estate of the deceased, although it was not ordered or authorized by the administrator. (p. 325.)

FUNERAL EXPENSES—Excessive Allowance for.—An undertaker's bill for five hundred and twenty-six dollars is excessive, and an allowance thereof by the jury for four hundred and fifty-five dollars will be disregarded by the court, when the deceased was a janitor, whose associates were mostly laboring men and whose estate was not worth over five thousand dollars. (p. 327.)

Action for funeral expenses. The administrator contended they were extravagant and foolish. The jury gave a verdict, and judgment was rendered, for four hundred and fifty-five dollars. The administrator appeals.

Smith & Smith, for the appellant.

H. M. Troy and Redmond & Stewart, for the appellee.

⁴⁵⁷ DEEMER, J. Edmond Lynch was about eighty years of age at the time of his death. He had for a number of years been a janitor in the general offices of the Burlington, Cedar Rapids and Northern Railroad Company at Cedar Rapids. He had no relatives in that city, and boarded with a Mrs. Weir, who received her pay from the paymaster of the railroad company. His associates were generally laboring men, and his most intimate friend was a street sweeper. ⁴⁵⁸ He left an estate valued at not exceeding five thousand dollars. When he died, plaintiff received a call to go to the place where the body was

lying, and to take charge of the remains. He embalmed the body, dressed it, furnished the casket, hearse, five carriages, chairs, etc., for the funeral, and presented the following bill to the administrator for payment:

Oct. 31.	To washing and embalming body.....	\$ 25 00
Oct. 31.	Shaving	5 00
Oct. 31.	Burial robe	20 00
Oct. 31.	Burial slippers	3 50
Nov. 1.	Casket	425 00
Nov. 2.	Use of candelabra.....	5 00
Nov. 2.	Chairs and candles.....	2 50
Nov. 2.	Hearse	10 00
Nov. 2.	Wagonette	4 00
Nov. 2.	2 landaus, at \$4.00.....	8 00
Nov. 2.	2 three-seated carriages, at \$4.00.....	8 00
Nov. 2.	Personal services rendered	10 00
		<hr/>
		\$526 00

Payment was refused, and this action followed. The trial court instructed: "3. You are instructed that the estate of deceased is liable for all reasonable and proper expenses necessary for decent interment of the deceased, and suitable for the station in life of deceased. Now, in this case you will satisfy yourselves from the evidence whether the items of charge are reasonable, and in conformity with the station in life of deceased, or otherwise; and if, from the evidence, you find that any of the charges in the account are not reasonable as necessary expenses attending the decent interment of deceased as funeral expenses, you will disallow the same, and allow plaintiff only what the evidence satisfies you the same are reasonably worth."

Defendant contends that the verdict is contrary to these instructions, and entirely without support in the evidence. The law with reference to such matters is well settled, and generally understood. Such charges are not, ⁴⁵⁹ strictly speaking, debts due from the deceased, but charges which the law out of decency imposes upon his estate. And, so far as these are reasonable in amount, they take legal priority of all such debts; as, likewise, do the administration charges. A decent burial should comport with the social condition of the deceased and the amount of his fortune. Justice to creditors, as well as to one's surviving family, demands, however, that there should be no extravagant outlay to their prejudice. If due regard to the character and social or public standing of the deceased requires a more costly

funeral, public or private liberality should defray the additional cost. "Foolish and extravagant funerals, ordered by those not immediately concerned in the estate, are not to bind the representative and the immediate family of the deceased": Schouler on Executors, 2d ed., sec. 421. Of course, one who furnishes reasonable burial equipment should be allowed the value thereof from the estate of the deceased, although it was not ordered by the administrator, or authorized by him. But whatever is furnished should reasonably comport with the station in life of the deceased and the amount of his property. The privilege thus granted should not be construed into a license to plunder the estate.

Lynch was a Catholic, and his burial was in accord with the customs and rites of that denomination. This was, of course, perfectly legitimate; but it is not shown, nor will we infer, that such customs call for gold trimmings or silk and satin linings of the casket. Our observation has led us to believe that this Christian denomination requires no more expensive funeral corteges for its members than any other. Surely, one may die in this faith without being troubled by visions of the undertaker plundering his estate. Seriously, the matter of a man's faith has little to do with the expenses of his funeral. It may, of course, call for some additional properties, which the law, out of regard for its policy of religious freedom, will ⁴⁶⁰ consider as necessaries. But the mere religious faith of one deceased adds nothing to the value of what is or should be furnished. We may quite readily agree that all the items mentioned in the bill were of such a character that they should have been furnished without being bound to accept the prices affixed as reasonable. That is to say, the deceased needed embalming, he needed proper clothing for burial, candelabra, chairs, candles, carriages, and proper services. But his burial robe need not be of satin, nor his casket metallic. The only evidence from plaintiff as to the value of the items furnished was, "They are all reasonable." He admitted on cross-examination that he never heard of a more expensive robe than the one he furnished; that he never put as good a robe as this one on a corpse before or since; that he had sold caskets from six dollars up to two hundred dollars and two hundred and fifty dollars, and that he had never before or since sold one for four hundred and twenty-five dollars; that the casket he furnished was made of oak, broadcloth, and glass, and covered with broadcloth, and that it was trimmed with what is known as silver and gold plated trimmings. It was shown in

the evidence introduced by defendant that the customary price for the use of a hearse was five dollars; that plaintiff paid but three dollars apiece for the landaus, three dollars each for the carriages, three dollars for the wagonette, and borrowed the candelabra, for the use of which he paid nothing. It was also shown that the usual price for embalming was ten dollars, that the usual price of a casket for such cases was from forty dollars to sixty dollars; that five dollars would buy a very nice robe, and that there was no charge for personal services when the body was embalmed. It was also shown that forty dollars or fifty dollars is the medium price for a casket. The testimony leaves no doubt in our minds that plaintiff gave Lynch the best he had, without any regard for expense, thinking, perhaps, that, as there were no known relatives, there would be no one to object. He furnished the most expensive materials, and provided such a casket as he had never sold "before or since." Manifestly, this ⁴⁶¹ does not comport with a modest estate of less than five thousand dollars, nor with the station the deceased had in business or society. The mere statement of the case condemns the claims more efficiently than any argument we can make.

But it is said that plaintiff testified that the prices were reasonable, and the jury was justified in believing him; and it is also argued that the whole matter was for the jury in any event. Suffice it to say that neither court nor jury is bound by a witness' estimate as to values, and, while the issue presented in this case is ordinarily for the jury, the case may be so plain that it is the duty of the court to interfere. That is the situation here. The idea that a man dying leaving an estate of less than five thousand dollars should have a casket costing four hundred and twenty-five dollars, and that his estate should be burdened with funeral expenses amounting to five hundred and twenty-six dollars, is little short of ridiculous. Courts will not permit such an injustice, no matter what the finding of the jury. The case is reversed, and remanded for a new trial, or, at plaintiff's option, he may have judgment in this court for the sum of one hundred and fifty dollars. This option is to be exercised within thirty days from the filing of this opinion. Plaintiff will, in any event, pay the costs of this appeal.

Reversed.

Funeral Expenses.—It is the duty of the executor or administrator to bury a deceased in a manner suitable to the estate he leaves behind him. If this duty, in the absence or through the neglect of the personal representative, is performed by another, not officiously but

under the necessity of the case, the law implies a promise to reimburse him for the reasonable expenses incurred. What expenses may properly be incurred under such circumstances depends largely upon the custom of people of like rank and condition of society and upon the condition of the estate: *O'Reilly v. Kelly*, 22 B. L. 151, 84 Am. St. Rep. 833, 46 Atl. 681.

DECATUR v. SIMPSON.

[119 Iowa, 488, 93 N. W. 496.]

GARNISHMENT—Reversal of Principal Judgment.—If the judgment against the principal debtor is reversed, a judgment against the garnishee will be set aside, although prior to a ruling on the motion therefor another judgment in favor of the plaintiff has been rendered on a retrial of the principal case. (p. 330.)

Haines & Lyman, for the plaintiff.

N. T. Guernsey and Will C. Rayburn, for the defendant and garnishee.

⁴⁸⁸ BISHOP, C. J. On April 9, 1900, Samuel Decatur obtained a judgment against W. S. Simpson in the district court of Powshiek county for the sum of two thousand five hundred dollars and costs. From such judgment an appeal was taken to this court. On April 23, 1900, and under execution issued upon said judgment, John Simpson was garnished as a supposed debtor of said W. S. Simpson. The answers of said garnishee were taken and filed in said court January 3, 1901. On the same day ⁴⁸⁹ there was filed by said Decatur a pleading controverting the answers of said garnishee, to which the garnishee made reply putting in issue the allegations of said pleading in so far as the same charged him with being a debtor of, or holding property belonging to, said W. S. Simpson. Thereafter, and on January 28, 1901, said matter came on for hearing before the court (Judge Dewey presiding); and such proceedings were had that a judgment was rendered in favor of said Decatur and against said garnishee for the sum of two thousand seven hundred and forty-two dollars and eighty-eight cents and costs. From this judgment the garnishee appeals, and such is the cause first above entitled. The original cause, in which judgment against W. S. Simpson was rendered, was determined by this court on January 24, 1902, and the judgment of the court below reversed for errors: 115 Iowa, 348. The cause was ordered remanded for a new trial, and a procedendo issued accordingly. On March 18, 1902, said W. S. Simpson filed in said original

cause a motion for writ of restitution, in which all the foregoing facts were set forth, and also that the judgment against John Simpson, garnishee, as above referred to, had not been satisfied. It was accordingly asked that said John Simpson might be discharged and exonerated from paying the judgment rendered against him as such garnishee under execution, and to the end that he, said W. S. Simpson, might be restored to his full rights in the premises. Before a ruling was had upon such motion, the original cause came on for retrial in said court, resulting in a further judgment on April 3, 1902, in favor of plaintiff. Afterward, and on the same day, said court (Judge Scott presiding) ruled on said motion, sustaining the same, and ordering that the garnishee, John Simpson, be discharged and exonerated from payment of the judgment against him as such. From such order the plaintiff, Decatur, appeals, and such is the cause second above entitled.

⁴⁹⁰ Based upon the facts as referred to in the foregoing statement, the appellant in the garnishment proceedings, John Simpson, moves this court to discharge the judgment standing against him as such garnishee, and the cause is submitted upon such motion, and without argument upon the merits of the appeal. While it is true that an appeal does not operate to stay the enforcement of a money judgment, no supersedeas bond being given, still it is equally true that an execution issued upon such judgment, and all proceedings had thereunder, are dependent for their validity upon the judgment being sustained. If property has been taken under such execution, restitution must be made: Code, sec. 4145. Of necessity, the rule must operate to release property held under garnishment, as well as property of a more tangible nature held under direct levy. Nor can it be said, in reason or upon authority, that a modification of the rule of the statute is called for, when it appears that it had been judicially determined under garnishment proceedings that a garnishee holds property or credits belonging to the judgment debtor, and a judgment is rendered against such garnishee requiring him to deliver the property in his hands, or pay over the amount of his indebtedness, or sufficient thereof to satisfy the principal judgment. The judgment, which alone authorized the garnishment being erroneous, all proceedings had thereunder are, as between the immediate parties, ipso facto void and of no effect: Waples on Attachment, 345, 346.

It is said in argument that the garnishment, and the judgment thereunder, ought not to be released, because of the fact that

the principal case had been again tried, and another judgment rendered in favor of the plaintiff. We ⁴⁹¹ are unable to see how such fact can affect the question. The garnishment had vitality only through the judgment upon which it was predicated. When the judgment became extinguished, the garnishment, which was but an incident to it, partook of its fate, and the right of the judgment defendant to have restitution made became absolute eo instanti. There is no authority for the proposition that a garnishment proceeding can be kept alive pending a new trial, and awaiting the possible arrival of a new judgment and execution under which it may again be fully vitalized, and to have effect as of the time when the garnishment proceedings were first instituted. In other words, garnishment proceedings are not susceptible of affiliation with a judgment having the relation only of a foster or step parent.

It follows from what we have said that the trial court was right in sustaining the motion to discharge the garnishee, John Simpson, and the order of discharge appealed from in the second case above entitled is affirmed. There being no further necessity for considering the appeal in the case first above entitled, it is dismissed.

Dismissed on first appeal. Affirmed on second appeal.

The Principal Case is cited in the recent monographic note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 132, on the reversal of judgments.

VORSE v. JERSEY PLATE GLASS INSURANCE CO.

[119 Iowa, 555, 93 N. W. 569.]

INSURANCE.—The Breaking of Plate Glass from an Explosion of gas generated from gasoline used in the building is not due to the blowing up of the building, within the meaning of a policy exempting the insurer from any loss "caused by the blowing up of buildings." (p. 331.)

INSURANCE.—The Breaking of Plate Glass from an Explosion of gas ignited by a match is not caused by a fire, within the meaning of a policy exempting the insurer from loss "by or in consequence of any fire." (p. 334.)

INSURANCE POLICY—Construction in Favor of Insured.—A policy of insurance susceptible of two constructions should be given the one most favorable to the insured. (pp. 331, 335.)

INSURANCE POLICY—Ordinary Meaning of Words.—The language of an insurance policy is to be given its ordinary and popular signification, rather than its technical meaning. (pp. 333, 335.)

McVey, McVey & Graham, for the appellant.

Edward Davis and C. C. & C. L. Nourse, for the appellee.

⁵⁵⁶ DEEMER, J. The action is on a policy insuring plaintiff against loss or damage by breakage, through accident, of certain plate glass in a building owned by her in the city of Des Moines. The policy contained these, among other, stipulations: "This company is not liable to make good any loss or damage which may happen by or in consequence of any fire, . . . and is not liable for any loss or damage to glass caused by the blowing up of buildings." During the life of the policy the insured property was broken and destroyed, and the cause thereof, according to the agreed statement of facts on which the case was tried, was as follows: "3. That the cause of said breakage and destruction in said west storeroom was the explosion of gas generating from gasoline being used in the rear of said room for the purpose of cleaning clothes, which gas was ignited by a match or light in the room, and said explosion was not caused willfully or by intention on the part of this plaintiff or her tenant; that the said breakage and destruction of the glass and explosion in said west room occurred prior to the fire in said building. 4. That on the same day other plate glass in the said building was broken and destroyed as set out in count two of plaintiff's petition as amended and substituted; that said glass was broken by firemen intentionally, and in order to gain access to the building for the purpose of extinguishing a fire which was then burning in the said storeroom; that the doors were fastened, and it was necessary to break in the front of the building for ⁵⁵⁷ the purpose of gaining admission to put out the fire." During the trial the plaintiff withdrew the second count of her petition; hence we have nothing to consider but the statements above made as to how the damage occurred.

1. Defendant contends that the damage was caused by the "blowing up" of the building. These words should be given their ordinary signification, in arriving at the intent of the parties; and we think, when defined in this light, and applied to the agreed facts which we have quoted, that it does not sufficiently appear that the building was blown up. Ordinarily the term means to scatter or destroy by an explosion of some kind. When we speak of a building as having been blown up, we ordinarily intend to convey the notion that its constituent parts have been scattered, and the integrity of the structure destroyed. This is evidently what is meant by the terms employed in the

policy now before us. In any event, the policy, if susceptible of two constructions, should be given that one which is most favorable to the insured: *Collins v. Merchants' etc. Ins. Co.*, 95 Iowa, 540, 58 Am. St. Rep. 438, 64 N. W. 602; *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157. With this rule in mind, we have no difficulty in arriving at the conclusion that the breakage was not due to the blowing up of the building. See, as supporting these conclusions, *Breuner v. Liverpool etc. Ins. Co.*, 51 Cal. 101, 21 Am. Rep. 703.

2. The next contention made by defendant is much more difficult of satisfactory solution. It is argued that the damage to the glass happened by, or was in consequence of fire. The real point made is that the explosion was due to, or was in consequence of fire, if not fire itself. The term "explosion" has no fixed and definite meaning either in ordinary speech or in law. It may be described, in a general way, as sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. It may and does vary in degrees of intensity and in the vehemence of the report, and it is not always due to the presence of fire. Indeed, it may result from decomposition or chemical action. In the case before us, it was undoubtedly caused by fire, or as stated in the agreed statement of facts "by a match or light in the room" which transformed the gasoline gas into heat which was propagated from one particle of air to another and finally against the glass, the shock of which caused the breakage complained of. The stipulation says that the breakage and explosion occurred prior to the fire in the building which we assume means that the glass was broken before any part of the structure or of the goods stored therein were ignited, for it is clear that there must have been a match or light in the room which caused the explosion. Did the breakage, then, happen by or was it in consequence of any fire?

The question is a nice one, and by no means free from doubt; but we are inclined to the view that the loss did not happen by nor was it in consequence of any fire as those terms are used in the policy in suit. Of course, but for the lighted match or other light in the room, the explosion would not have happened, and the explosion itself was due to rapid combustion. But in ordinary parlance, the damage was due to the explosion or to the concussion produced thereby, or, as said in the agreed statement of facts, the explosion and breakage occurred prior to the fire in the building. The lighted match or other light in the building was not contemplated by the parties as the fire which was

excepted by the terms of the policy. It was not a destructive fire against the immediate effects of which the condition in the policy was intended as a protection. It was, it is true, the possible means of putting the destructive force in motion, but was not the excepted peril. Had there been no fire after the explosion, it seems to us it could not fairly be claimed that the damage done the glass was due to or in consequence of any fire. The immediate cause of the breakage was concussion produced by the ignition of gas, it is true; but that such an effect ³⁵⁹ was due to or in consequence of fire as that term is ordinarily used or as the parties intended it in this case is hardly supposable. In Wood on Insurance, volume 1, second edition, page 245, it is said: "Where, however, the explosion is caused by fire the damage must be traceable directly to the fire as the proximate cause, and not merely as the result of the explosion. The fire must be shown to be the *causa proxima* and not the *causa remota*. If the injury is entirely due to concussion, the fact that it was caused by fire does not make the fire the proximate cause, but the cause of the cause, and, consequently, the *causa remota* instead of the *causa proxima*. 'It were infinite for the law,' says Lord Bacon, 'to consider the causes of the causes, and their impulsion one of another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' 'If it were not so,' said Byles, J., 'and a ship was in the neighborhood of Etna or Vesuvius, and was violently shaken by an eruption, that would be damage by fire; or if a gun were fired off, loaded with small shot, among crockery, that would be damaged by fire; or it might be said that, if the heat of the sun was too great, that would be damage by fire.' "

Policies of insurance should not have a technical construction for the purpose of defeating the insured. He has nothing to do with the wording of the policy, and must accept it as tendered. Hence, the rule of construction hitherto quoted. Indeed, we think language such as that on which defendant relies should be given its ordinary and common signification, and not its scientific and technical meaning. The insured went to the company for a policy of insurance on the plate glass in her building, and received a policy providing indemnity for breakage not caused by, nor in consequence of, any fire. She had the right to assume that the policy covered damage by an explosion, such as the one in question, and was ³⁶⁰ not called upon to go to some scientist for a technical definition of fire. After all, the question is, What would an ordinary man understand from the use

of the term? Would such a person, having no technical information on the subject, understand that a gasoline explosion, caused by a lighted match, was a fire, in the absence of proof that something aside from the gas was ignited? We think not. At any rate, the trial judge was authorized to find the negative of this proposition. We cannot too strongly emphasize the thought that the match or other light referred to in the agreed statement of facts was not a fire, within the meaning of the condition of the policy now under consideration: See *United Life Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Transatlantic Assn. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Briggs v. North American etc. Ins. Co.*, 53 N. Y. 446.

If, then, the lighted match, or other fire which caused the explosion, was not a fire, within the condition of the policy, and there was no ignition of the building, or of the goods stored therein, which caused the breakage, but all damage was done before the fire was started, as stated in the agreed statement of facts, then it is clear that plaintiff had a right to recover, and that the district court was correct in its holding. The parties themselves have distinguished the explosion from the fire in their agreed statements of facts, from which we have quoted. Giving the language used in the policy its ordinary signification, and applying it to the agreed statement of facts, we think the damage did not happen by, nor in consequence of any fire. See, as further supporting our conclusions, *Everett v. London Assur. Co.*, 19 Com. B., N. S., 126; *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. Rep. 22; *Kenniston v. Mercantile etc. Ins. Co.*, 14 N. H. 341, 40 Am. Dec. 193; *Dows v. Merchants' Ins. Co.*, 127 Mass. 346; *Millaudon v. New Orleans Ins. Co.*, 4 La. Ann. 15, 50 Am. Dec. 550; *Transatlantic Co. v. Dorsey*, 56 Md. 79, 40 Am. Rep. 403; *Louisville Underwriters v. Durland*, 123 ⁵⁰¹ Ind. 544, 24 N. E. 221; *Boatman's etc. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217.

We must take notice, it is said in argument, of the fact that the condition in the policy in suit exempting the company from liability for fire was for the purpose of avoiding double insurance, and that, if the property was destroyed by fire, it was covered by the fire policy on the building, of which the plate glass was a part. Conceding the rule, the conclusion by no means follows. If we are to consider these matters, we are also justified in assuming that the fire policy, if there was one, on the prop-

erty, contained the usual stipulation exempting the company from liability for losses occasioned by explosions. It is well known that policies of insurance usually contain such exceptions. See standard forms in the states of Michigan, Minnesota, New Jersey, North Dakota, Pennsylvania, Wisconsin, Massachusetts, and New Hampshire, as set forth in the appendix to Clement's Fire Insurance Digest; also at page 8 of Table of Contents. With such an exception in a fire policy, it is manifest that it would not cover such a loss as happened in this case.

Keeping in mind the fact that the language of a policy of insurance is to be given its ordinary and popular signification, rather than its technical meaning, and that, when capable of two constructions, it is to be given that which is most favorable to the insured, we reach the satisfactory conclusion that, under the agreed statement of facts in this case, the defendant is liable for the breakage. The judgment is therefore affirmed.

Insurance Policies are construed liberally with a view to the protection of the insured. If a policy is susceptible of two interpretations, it will be given the one most favorable to the insured: *Wertheimer-Swartz Shoe Co. v. United States Casualty Co.*, 172 Mo. 135, 95 Am. St. Rep. 500, 72 S. W. 635; *Thornton v. Traveler's Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, and cases cited in the cross-reference note thereto.

HOAGLIN v. HENDERSON & COMPANY.

[119 Iowa, 720, 94 N. W. 247.]

PARTNERSHIP.—A Husband and Wife may be Partners under the statutes of Iowa extending the powers of married women in respect to the making of contracts and the ownership and disposition of separate property. (p. 339.)

PARTNERSHIP FUNDS.—Application to Individual Debt.—Where a partner, without disclosing the fact of partnership, purchases goods for the firm, the vendor cannot apply the money paid in advance to the satisfaction of a debt owing from the partner individually. (p. 341.)

PARTNERSHIP.—Setoff Against.—In an Action by a partnership to recover a partnership claim, the debtor cannot set off a claim which he holds against an individual member of the firm. (p. 341.)

PARTNERSHIP.—Garnishment of Individual Interest.—A partner's individual interest in a debt due the firm cannot be reached by garnishment in a court having no power to acquire jurisdiction of the partnership or determine the interest of each partner. (p. 342.)

George F. Heindel and McNett & Tisdale, for the appellants.

A. W. Enach and Work & Work, for the appellees.

⁷²² **McCLAIN, J.** The nature of the controversy involved in this case, and the questions of law arising therein, will be better understood from a brief narrative of the facts as shown in the evidence: H. A. Hoaglin had been engaged in business at Mt. Pleasant, and in January, 1900, sold out his business, receiving therefor a sum in cash entirely insufficient to pay the indebtedness contracted by him in conducting his business. Being without other property or resources, he proceeded to settle with his creditors, who were pressing for payment of their respective claims, by paying to each a portion of the indebtedness, taking receipts in full for the respective claims. It does not appear that these settlements were made on any uniform basis, or in pursuance of any agreement for composition with creditors. In some instances about one-third of the claims were paid, in other instances more. One of these creditors was the defendant firm, and through their attorney they accepted one-third of their claim, and receipted in full for the entire amount. Thereupon H. A. Hoaglin, with his wife, who had previously been conducting a millinery business in her own name, in connection with the business carried on by H. A. Hoaglin, removed to Ottumwa, and, as it is contended, entered into a contract to carry on a partnership business under the name of H. A. Hoaglin. This alleged firm was without other assets than two hundred and fifty dollars of the wife's money, and five hundred dollars borrowed by husband and wife on their joint note from the wife's sister. With this sum of money in hand, H. A. Hoaglin, without disclosing the fact that he was acting as member of the alleged firm, or that his acts were done otherwise than in his individual capacity, ordered, through one Meades, ⁷²³ the traveling agent for defendant firm, a bill of goods amounting to one thousand dollars, paying five hundred and seventy-five dollars by draft delivered to said Meades, and proposing to pay the balance on time. The order contemplated the immediate shipment of the goods from defendants' place of business, in Chicago, to H. A. Hoaglin, at Ottumwa. Meades, having no authority to accept an order, forwarded the order to defendants for acceptance and approval, accompanied by the draft, whereupon defendants refused to accept the order, and notified Hoaglin that they would retain so much of the money as was necessary to satisfy the balance of their previous indebtedness against him, and would pay

over to him, or furnish him goods for the surplus. Thereupon Hoaglin and wife, suing as partners, brought this action to recover from defendants the amount of money represented by the draft delivered by Hoaglin to Meades for defendants, and appropriated by defendants to their own use. The suit, as originally brought, was by attachment, and notice was by publication, but defendants entered an appearance and secured the dismissal of the attachment by giving bond to pay the amount of any judgment rendered.

The case was presented to the jury in the lower court on the theory that if the evidence showed Hoaglin and wife to have been partners, and the money paid by Hoaglin to Meades to have been partnership funds, then the attempted application by defendants of the money received through Meades to the satisfaction of the individual debt of Hoaglin was improper, and plaintiffs, as partners were entitled to recover the entire amount so paid; and counsel for appellants present the question whether husband and wife can be partners, contending that there was no lawful partnership, and that the money paid by Hoaglin was his own money, out of which defendants had a right to recoup themselves to the extent of Hoaglin's previous indebtedness to them. We shall not stop to consider the question whether the acceptance by ⁷²⁴ defendants from Hoaglin of a part of his previous indebtedness, under the agreement that the entire indebtedness should thereby be discharged, constituted an accord and satisfaction, but shall proceed at once to determine whether a legal partnership between husband and wife can exist in this state.

1. The common-law rule that married women cannot enter into a contract of partnership seems to be based on their incapacity at common law to contract for any purpose: Collyer on Partnership, 5th Am. ed., sec. 15; Parsons on Partnership, sec. 19; Weisiger v. Wood, 36 S. C. 424, 15 S. E. 597; De Graun v. Jones, 23 Fla. 83, 6 South. 925. The power of a married woman to enter into a contract of partnership, if it exists at all in any of the states in which the common-law system prevails, must depend upon statutory authority; and in several cases the question has been considered as to whether particular statutory enlargements of the powers of married women as to contracting and managing their separate property have rendered them competent to enter into partnership relations. Thus it has been held that authority to acquire, hold and dispose of property as a separate estate will sustain a contract of partnership made by a married woman with a person other than her husband:

Abbott v. Jackson, 43 Ark. 212. And, undoubtedly, the general power to contract which is conferred upon married women in some states would support a contract of partnership. But on the question whether the statutes extending the powers of married women with reference to the making of contracts and the ownership and disposition of separate property confer the power to enter into the relation of a business partnership with the husband, the courts seem to be somewhat at variance, not only on account of differences in terms of the statutes in which the power is conferred, but also on account of differences of opinion as to the bearing ⁷²⁵ of rules of public policy. In Massachusetts it is said that authority to buy and sell and enter into contract with reference to her personal property, to carry on trade, and to sue and be sued, does not involve power to enter into a partnership with the husband: *Lord v. Parker*, 3 Allen, 127. To the same effect in states where the statutes give a married woman the right to control and contract with reference to her property, see *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Fuller v. McHenry*, 83 Wis. 573, 53 N. W. 896; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, 40 N. W. 907; *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229; *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 35 Am. St. Rep. 105, 19 S. W. 747. In other states, statutes to substantially the same effect have been held to so far enlarge the legal capacity of a married woman as to authorize her not only to enter into a partnership contract in general, but specifically to enter into such contract with her husband: *Toof v. Brewer* (Miss.), 3 South. 571; *Suan v. Caffé*, 122 N. Y. 308, 25 N. E. 488. It has been held, however, that where the statutes not only confer the right to own and contract with reference to her separate property, but also the general power to contract, the wife may not only enter into business partnership relations in general, but also specifically with her own husband, and this is said not to be contrary to any dictate of public policy: *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915; *Lane v. Bishop*, 65 Vt. 575, 27 Atl. 499. And see *Bernard etc. Co. v. Calvin*, 12 C. C. A. 123, 64 Fed. 309.

The question of public policy involved in these statutory enlargements of the powers and liabilities of married women must be determined with reference to the general tenor of the statutory provisions on the subject as they ⁷²⁶ are found in the different states. In this state, under the provisions of Code,

sections 3153, 3164, which give to married women the right to acquire, own and dispose of property in the same manner and to the same extent as their husbands may do, and to make contracts and to incur liabilities which may be enforced by or against them to the same extent and in the same manner as if they were unmarried, it is not open to question that a wife may become surety for her husband, and be liable generally on such contract of suretyship, may become the general creditor of her husband, may be joint owner of property with him, and may be his agent, or may make him her agent, in the transaction of business. Citation of authorities to support these propositions would be wholly unnecessary. These unquestioned powers of a married woman, in this state, to deal with her husband would seem to cover all the powers and liabilities involved in entering into or continuing the relation of partner with her husband. The essential characteristics of a partnership seem to be joint ownership of property, and authority of each partner to bind the other by his acts with reference to the partnership property, and also to impose upon the other partnership liability. As these relations may be separately sustained between husband and wife, we see no reason why they may not be collectively created by entering into and carrying on the relation involved in the formation of the entity known as a partnership.

The only objection which occurs to us is that involved in the denial of the capacity of husband or wife to maintain a suit in a court of law or equity against the other, except as such power is expressly conferred, as decided in *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353, in which we have held that the relations of husband and wife to each other are such as to preclude a suit by the one against the other for breach of contract or for tort, unless it be for the preservation or protection of the separate property; and it is ⁷²⁷ argued that this inability of the wife to sue the husband would preclude the existence of a business partnership arrangement between them. But we do not think that the conclusion follows. The same argument would lead to the result that a valid contract cannot be made between them, such as a contract for the repayment of money advanced by one to the other; and yet, as we have suggested, that is not the law of this state, and there is no intimation in the *Heacock* case that it was intended by that decision to declare that such contracts are necessarily invalid. It, no doubt, might at one time have been reasonably argued that, inasmuch as a right of action by the wife against the husband was denied

to her, she was not competent to voluntarily enter into contract or joint property relations with him, such as would involve for their protection, a general right to sue. But the time for that argument is past. The right to contract with the husband is now so well established that it would be inexcusable to say that its existence is negatived by a holding that public policy forbids a suit by the wife against the husband on account thereof. It may well be suggested, also, that there is express authority for a suit by the wife against the husband to recover her property, or any right growing out of the same (Code, section 3155), and therefore, that, as the wife may at any time terminate any business partnership relation which may exist with her husband, and thereby become practically a joint owner only with him in the partnership property, there would seem to be no impossibility of sustaining an action by her against him for any right growing out of their joint ownership. In short, we think that, in view of the statutory provisions extending the legal powers and rights of married women, we cannot say that there is any public policy recognized in this state which precludes the existence of a business partnership relation between husband and wife. None of the cases holding that such relation cannot exist are applicable to a ⁷²⁸ condition of affairs as to the wife's capacity to make general contracts, and own and control her own property, such as exists in this state, except that of *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224, and *Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561, and we find ourselves unable to indorse the views expressed in these cases. Our conclusions find support not only in the cases already cited, but also in *Belser v. Tuscumbia Banking Co.*, 105 Ala. 514, 17 South. 40; *Schlapback v. Long*, 90 Ala. 525, 8 South. 113; *Fuller v. Ferguson*, 26 Cal. 546; *In re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7824; *Clark v. Hezekiah* (D. C.), 24 Fed. 663; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663.

2. Counsel for appellants argue that as Hoaglin, in dealing with defendants' agent, Meades, did not disclose the fact of partnership, and both Meades and his principals were justified in assuming that the transaction was in his own name and right, the plaintiffs, as partners, cannot occupy any different position from that which Hoaglin would have occupied, had he acted for himself. But it will be noticed that Hoaglin had no occasion to disclose the partnership. The transaction would have been perfectly valid and regular, and the goods purchased would have been the goods of the partnership, had they been shipped in

accordance with the contract which Hoaglin made, for the fact of partnership is established by the verdict of the jury, and no wrong or fraud was perpetrated or intended, so far as the evidence shows, in the transaction between Hoaglin and Meades. Defendants have not been placed in any worse position, or in any way prejudiced, by lack of knowledge that Hoaglin was acting for the partnership. Had they accepted the order, and in good faith carried out the arrangements made between Hoaglin and Meades, they would have been in no way prejudiced, ⁷²⁹ but would have acquired all the rights that it was intended they should acquire under that transaction. When they attempted to keep the money received by them, as Hoaglin's individual money, and to apply it to a wholly different purpose from that for which it was paid to them, they took their chances of being able to establish the fact; and if the money in fact belonged to a partnership, or to any other party, they must abide by the consequences.

3. Defendants, then, have no claim on the money received by them from Hoaglin as partner, unless it is competent, in an action by the partnership to recover a partnership claim, for the debtor to set off a claim which he holds against an individual member of the partnership. It has been held by this court that, in an action by a member of a partnership for an indebtedness due to him individually, the debtor may set off a claim against the partnership: *Allen v. Maddox*, 40 Iowa, 124. But there is no case in this court in which it has been held conversely that a claim against a partner can be set off against an indebtedness due to the partnership. It is true that under some circumstances a partner may apply partnership money to the payment of his own debt: *Dob v. Halsey*, 16 Johns. 34, 8 Am. Dec. 293; *Babcock v. Standish*, 53 N. J. Eq. 376, 51 Am. St. Rep. 633, 33 Atl. 385. But certainly there is no rule of law by which he can be compelled to do so. To determine what interest Hoaglin, as a partner, had in the money paid by him as partnership money to the defendants, would involve a settlement and winding up of the partnership affairs. It certainly cannot be true that, whenever suit is brought on a partnership claim, the debtor, on the ground that he has a claim against the individual member of the partnership, can bring the partnership into a court of equity to be wound up, and to have the interest of each partner in each item of its property determined.

⁷³⁰ Moreover, the statute regulating counterclaims (Code, section 3570), requires that any new matter constituting a cause

of action in favor of the defendant against the plaintiff, not arising out of the contract or transaction set forth in the petition, must, to be available as a counterclaim, be in favor of all the defendants, if more than one, and against all the plaintiffs, if more than one, and that description does not fit this alleged counterclaim.

4. Something is claimed in behalf of defendants on account of a garnishment proceeding in Illinois, in which it was sought to hold defendants as debtors of Hoaglin. What is said in the preceding paragraph will dispose of this contention. Defendants were not debtors of Hoaglin, but of the firm composed of Hoaglin and his wife; and it would be manifestly absurd to contend that Hoaglin's individual interest in his indebtedness due to the firm could be reached in a court having no power to acquire jurisdiction of the partnership, or determine the interest of one partner in the partnership claim: *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768; *Sheedy v. Second Nat. Bank*, 62 Mo. 17, 21 Am. Rep. 407; *Myers v. Smith*, 29 Ohio St. 120; 2 Bates on Partnership, sec. 1103.

As to defendants' counterclaim, and also the defense made by reason of this alleged garnishment, it may be suggested that the only method provided by statute for reaching the individual interest of a partner in satisfaction of a debt due by him is pointed out by Code, sections 3904, 3977, 3978, which authorize the levy of an attachment or an execution by equitable proceedings to ascertain the nature and extent of such interest. There was in this case no attachment or execution against Hoaglin individually, and therefore there was no opportunity for applying the provisions of these sections.

After considering all the questions raised in behalf of appellant, we reach the conclusion that the judgment of the trial court should be affirmed.

A Husband and Wife may form a partnership: *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915. The rule was otherwise, however, at the common law, and the common-law doctrine still prevails in some of the American Commonwealths: *Gilkinson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 35 Am. St. Rep. 105, 19 S. W. 747; *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 52 Pac. 224, 31 Am. St. Rep. 919, and note.

The Right of Setoff where partnership and individual demands are involved is discussed in the monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 590; *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458, 53 Atl. 837; *Drennen v. Gilmore*, 132 Ala. 246, 31 South. 90, 90 Am. St. Rep. 902, and cases cited in the cross-reference note thereto.

On the Application of Payments, see the recent monographic note to *McWhorter v. Bluthenthal*, 96 Am. St. Rep. 44-82.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE v. ATKIN.

[64 Kan. 174, 67 Pac. 519.]

MUNICIPAL CORPORATIONS, Public Highways of—Power of the Legislature to Control.—It is the duty of the state to lay out and improve highways of travel. The performance of this duty in cities rests on the state with the same obligation as in unincorporated country districts, and the legislature may control the work necessary in the performance of this public duty, whatsoever the agency employed in carrying it out. (pp. 345, 346.)

MUNICIPAL CORPORATIONS—Public Highways, Control of the Hours of Labor upon.—The Legislature may Provide What shall Constitute a Day's Labor for all workmen, mechanics, and other persons employed by or in behalf of the state, or any county, city, township, or other municipality therein, and that any officer or contractor violating the provisions of the act shall be punished by fine or imprisonment, or both; and such act applies to labor performed on the public streets of a municipality. (p. 346.)

A. A. Godard, attorney general, J. S. West, E. A. Enright, county attorney, and B. S. Smith, for the state.

T. A. Pollock, for the appellant.

¹⁷⁴ SMITH, J. The appellant was convicted of a violation of chapter 114 of the Laws of 1891 (Gen. Stats. 1901, secs. 3827-3829). He was charged with having entered into a contract with the mayor and councilmen of the city of Kansas City, Kansas, a city of the first class, for the paving of a public street known as ¹⁷⁵ "Quindaro Boulevard," and that he hired one Reese, a common laborer, to work for him in laying the pavement, and unlawfully permitted Reese to work more than eight hours per day at such employment. The question necessary to be considered is whether the city is such an agency of the state in

the doing of the work which the appellant contracted to do as to bring the case within the principle of *In re Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380. It was there decided that Dalton, who undertook to build a courthouse under a contract with the commissioners of a county, having permitted a stone mason to work for him more than eight hours per day in the construction of the building, was amenable to the penalties of the act. The decision was based upon the fact that the law was a direction by a principal (the state) to one of its agents (the county). It is contended in this case that the city, in awarding the contract to Atkin, was not exercising governmental power, but quasi private power, in the exercise of which it was governed by the same rules which apply to an individual or a private corporation. The law which appellant violated must have its application in the light of the fact that municipal corporations are the creatures of the state. The legislature gives them being. They let contracts for the improvement of streets under express authorization of the legislature, and cannot do so in the absence of such authority. In this instance the law-making power provided that the cost of the paving which the appellant was constructing should be paid by assessment against the abutting property. It might have provided a different method of payment, or withheld entirely from the city the right to improve its streets. In *city of Clinton v. Cedar Rapids etc. R. R. Co.*, 24 Iowa, 455-475, Chief Justice Dillon, speaking for the court, said: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature." When a city attempts to pave, it must proceed in the manner pointed out by statute. Its officers look to the state law as a guide when declaring the work necessary to be done, and on through, at each step, in awarding the contract, the assessment of the cost, and its collection from the property owners benefited, they must conform strictly to the directions which the state has seen fit to impose. The opening

and improvement of highways is a matter of public concern. The whole body of the people is benefited by the paving of city streets. Though residents of rural districts receive the benefits in a less degree, from the fact that they do not so frequently have occasion to travel over such streets, yet they are open to all alike, and they are referred to in the statutes and in common parlance as "public highways." In *State v. Irrigation Co.*, 63 Kan. 394, 65 Pac. 681, it was said: "The state has a paramount authority over the subject of highways. It is of interest to the general public ¹⁷⁷ that the roads which lead from one county to another, and into and through every township and county in the state, should be kept free from impediments to travel, so that communication may be open and convenient from one end of the state to the other." In *State v. Commissioners of Shawnee Co.*, 28 Kan. 431, 433, it was held that the legislature has power to establish a state road, and cast the cost and expense thereof upon the county in which the road lies, without the approval of the county commissioners or the people of the county: "Second, it will be borne in mind that the purpose for which this expense is cast upon the county is a purely public purpose—one that is universally and without question recognized as such. It is not like compelling a county to take stock in a railroad corporation, or to aid in the building of a railroad, or to invest its public moneys in any enterprise in which there is something of private interest. A public highway is a matter solely of public interest. The laying out and keeping in order of highways is one of the ordinary duties of counties and cities." "In respect to the care, regulation, and control of the highways, the city exercises a portion of the powers of the state, subject only to the end in view, the right of the public to their use as public highways, and the higher control of the state herself": *Branson v. City of Philadelphia*, 47 Pa. St. 329-332. See, also, *State ex rel. Bulkley v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, and note at pages 466 and 467; *Tiedeman on Municipal Corporations*, sec. 301; *State v. Freeman*, 61 Kan. 90, 91, 58 Pac. 959. The case of *People v. Flagg*, 46 N. Y. 401, is pertinent to the question involved.

It is and always has been the duty of the state to lay out and improve highways of travel. The performance ¹⁷⁸ of this duty in cities rests on the state with the same obligation as in unincorporated country districts. The statute gives countenance to this duty upon the state when it places the fee of city streets in the county. The obligation to lay out and improve highways of

travel is imposed on the state in its general political capacity, and it follows that the legislature may control the work necessary in performing this public duty, whatsoever agency may be employed in carrying it out. It may prescribe the plans for the highway in either city or county, and regulate the hours of work required to complete such plans. Under the general road law of the state, all streets and alleys in cities which have been or may hereafter be laid out, are declared to be public highways: Gen. Stats. 1901, sec. 6030. In prescribing the powers of the mayor and councilmen of cities of the first class, such city is constituted a separate road district: Gen. Stats. 1901, sec. 727, subd. 34.

The city, in contracting to pave Quindaro boulevard, exercised delegated authority, and acted as an agent for the state. The latter did not, by authorizing the mayor and council to lay the pavement, surrender its paramount authority over the control of the city streets. If the state had been doing this work, it cannot be denied that it might, at its pleasure, have given the current rate of per diem wages in the city for eight hours' work performed by any of its servants. This is the principle of the Dalton Case.

The case of *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337, is cited as an authority for counsel for appellant. It was there stated that a city, in making contracts for water supply, was exercising quasi private power, and that in respect to such engagements it was ¹⁷⁹ governed by the same rules which apply to an individual or private corporation. To the same effect, see *State v. Downs*, 60 Kan. 788, 57 Pac. 962. We nowhere find it said in our decisions that as to waterworks and the like, which are of local and not state concern, the state has paramount control. They differ from public roads, in the building and maintenance of which all the people of the state are interested.

The fact that the abutting property owners are charged more for the improvement, by the application of the restrictive provisions of the law reducing the hours of labor, may be admitted; yet if the work had been done by the state itself, which, as we have shown, has supreme authority in such matters, the property owners could not complain that it employed and paid its servants conformably to the statute in question. There can be no distinguishing difference between the acts of the contractor in the employ of the county passed upon in the case of *In re Dalton*, 61 Kan. 257, 59 Pac. 336, and those of the appellant here. Both were proceeding under contracts made with them

by the agents of the state, and the principal had power to direct that eight hours should constitute a day's work for all persons laboring in its behalf.

The judgment of the court below will be affirmed.

Johnston, Cunningham, Greene, Ellis, and Pollock, JJ., concurring.

DOSTER, C. J., concurring specially. I concur in the decision of this case, and in all the reasoning on which it is based; but, lest the remarks made in some of the closing paragraphs of the opinion concerning *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337, 338, should be construed as an intimation that a different rule might apply in the case of purely municipal improvements, such as waterworks, from the one applicable to improvements made by cities as agencies of the state, I desire to say that I do not perceive the occasion for the application of any different rule.

The Case of *In re Dalton*, 61 Kan. 257, 59 Pac. 336, referred to in the principal case, was one involving the validity of a statute of the state enacted in 1891, providing that "eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons now employed or who may hereafter be employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state," except in certain special contingencies therein provided for; that all contracts thereafter made on behalf of the state or by or in behalf of any county, city, township, or other municipality thereof for the performance of any work or the furnishing of any material manufactured within the state should be deemed as made upon the basis of eight hours constituting a day's work; that it should be unlawful for any corporation or person to require or permit any laborer, workman, mechanic, or other person to work more than eight hours per calendar day in doing such work or furnishing such material; and that any officer of the state or of any county, city, township, or municipality thereof, or any person acting under or for such officer or any contractor within the state or any county, city, township, or other municipality thereof, or other person violating any provisions of the act should for each offense be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment for not less than six months, or by both fine and imprisonment, in the discretion of the court. Dalton was a contractor who had violated the provisions of the act by permitting one Peterson to work ten hours on a day specified at and upon the labor of laying stone as a stone mason in the construction of a county courthouse and jail within the county of Geary. A warrant having been issued by a justice of the peace charging Dalton with this violation, he petitioned for a writ of habeas corpus to procure

this discharge from the custody of the sheriff. The writ was denied, on the ground "that the law for the violation of which the petitioner was prosecuted should be regarded as a direction by a principal to his agent, a matter of concern to the principal and agent alone."

In the principal case a writ of error was prosecuted to the supreme court of the United States, where the judgment of the state court was affirmed in an opinion which, so far as material is as follows:

"No question arises here as to the power of a state, consistently with the federal constitution, to make it a criminal offense for an employer, in purely private work in which the public has no concern, to permit or to require his employes to perform daily labor in excess of a prescribed number of hours. One phase of that general question was considered in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, in which it was held that the constitution of the United States did not forbid a state from enacting a statute providing—as did the statute of Utah there involved—that in all underground mines or workings and in smelters and other institutions for the reduction or refining of ores or metals, the period of the employment of workmen should be eight hours per day, except in cases of emergency, when life or property is in imminent danger. In respect of that statute, this court said: 'The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours a day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.'

"As already stated, no such question is presented by the present record, for the work to which the complaint refers is that performed on behalf of a municipal corporation, not private work for private parties. Whether a similar statute applied to laborers or employes in purely private work would be constitutional is a question of very large import, which we have no occasion now to determine or even to consider.

"Assuming that the statute has application only to labor or work performed by or on behalf of the state, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the fourteenth amendment. He insists that the amendment guarantees to him the right to pursue any lawful calling, and to enter

into all contracts that are proper, necessary, or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws: *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427; *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. Rep. 128. In this connection, reference is made by counsel to the judgment of the supreme court of Kansas in *Ashby's Case*, 60 Kan. 101, 106, 55 Pac. 336, in which that court said: 'When the eight-hour law was passed, the legislature had under consideration the general subject of the length of a day's labor for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services.'

“ ‘If a statute,’ counsel observes, ‘such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the state and its municipalities? . . . Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?’

“These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed: *Rogers v. Burlington*, 3 Wall. 654, 665; *United States v. Baltimore etc. R. Co.*, 17 Wall. 322, 328, 329; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 525; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 380; *Hill v. Memphis*, 134 U. S. 198, 203, 10 Sup. Ct. Rep. 562; *Barnett v. Denison*, 145 U. S. 155, 189, 12 Sup. Ct. Rep. 819; *Williams v. Eggleston*, 170 U. S. 304, 310, 18 Sup. Ct. Rep. 617. In the case last cited we said that ‘a municipal corporation is, so far as its purely municipal rela-

tions are concerned, simply an agency of the state for conducting the affairs of government, and, as such, it is subject to the control of the legislature.' It may be observed here that the decisions by the supreme court of Kansas are in substantial accord with these principles. The court, in the present case, approved what was said in *Clinton v. Cedar Rapids etc. R. Co.*, 24 Iowa, 455, 475, in which the supreme court of Iowa said: 'Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature': See, also, *In re Dalton*, 61 Kan. 257, 59 Pac. 336; *State ex rel. Barton County Attorney v. Lake Keon etc. Irr. Co.*, 63 Kan. 594, 65 Pac. 681; *State ex rel. Attorney General v. Shawnee County*, 28 Kan. 431, 433; *Frederick v. Groshon*, 30 Md. 436, 444, 96 Am. Dec. 591.

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character.

"If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of anyone. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics, and workmen upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of

its municipal agencies should permit or require an employé on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

“If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employé to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employés and employer, it is sufficient to answer that no employé is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

“So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people’s representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the constitution. It cannot be affirmed by the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question.

“Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employé the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf

either of the state or of its municipal subdivisions, and alike to all employed to perform labor on such work.

“Some stress is laid on the fact stipulated by the parties for the purposes of this case, that the work performed by defendant’s employé it not dangerous to life, limb, or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done.

“The judgment of the supreme court of Kansas is affirmed.

“The chief justice, Mr. Justice Brewer, and Mr. Justice Peckham, dissent.”

For Other Statutes Limiting the Hours of daily service of employes on public works, see Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120. Consult, also, the monographic note to Booth v. People, 78 Am. St. Rep. 244, 245; State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52.

PARK v. ENSIGN.

[66 Kan. 50, 71 Pac. 230.]

JUDGMENT, Attorney not Bound by When not a Formal Party.—A judgment in an action against a principal is not binding on his sureties or either of them, though one of them, as an attorney for the principal, conducted the defense of the action. (p. 354.)

A JUDGMENT Against a Principal does not Estop His Sureties.—Except in those cases where, upon a fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of an action, a judgment against a principal is not conclusive against his surety. (p. 355.)

PRINCIPAL AND SURETY—Duty to Defend Actions or to Represent His Cosurety.—A contract of suretyship imposes no duty upon the sureties to defend their principal, gives the principal no right to represent the sureties, and gives no surety any authority to charge his fellows by virtue of his knowledge or his conduct. (p. 355.)

A JUDGMENT Against a Principal on a Promissory Note is not Prima Facie Evidence Against His Surety. (p. 355.)

PRINCIPAL AND SURETY—Waiver of Defenses by.—The refusal of sureties, in an action against them and their principal, to litigate a question of damages for which they are not answerable, cannot preclude them, when sued, from asserting any defenses which

would have been available in favor of their principal, including a claim for damages on his part against the plaintiff in the action. (p. 356.)

TRIAL—Right to Open and Close.—In an action against sureties on a note, the execution of which is admitted, in which they interpose as a defense a claim for damages in favor of their principal, they are entitled to open and close the case. (p. 356.)

The action was brought by a landlord, Daniel Ensign, against his tenants, D. B. and S. R. Park, and also against Thomas W. Park, W. H. Strother, and G. B. Strother, sureties, to recover upon a promissory note for rents, and also to recover for damages to the leased premises. A demurrer was interposed and sustained, on the ground that several causes of action were improperly joined.

The plaintiff then filed two separate petitions, one against the principal for the balance due on the note, and the other against the sureties for the same purpose. In the case against the tenants, they set up a counterclaim for damages claimed to have resulted to them from the destruction of a fence on the leased premises, but a verdict was found and a judgment entered against them. In the other case, the sureties set up the same defense against their liability which their principals had unsuccessfully asserted in the action against them. The trial court, however, ruled that the former judgment against their principals was conclusive against the sureties, and further, that the burden of proof in the action was on the plaintiff, and hence that the defendants had not the right to open and close. Among other findings made by the trial court were two as follows:

“10. The defendant George B. Strother is an attorney at law, and appeared at the trial of said cause against the said D. B. Park and S. R. Park as one of the attorneys for said defendants and assisted in managing and conducting their defense.”

“15. The defendants in this action, by their demurrer aforesaid, voluntarily declined to litigate any questions which might arise upon said lease, for the reason that they had not signed that instrument, and in this action plaintiff seeks to recover against them on the note alone, and only the amount found to be due from their principals, D. B. Park and S. R. Park.”

The defendants introduced evidence tending to sustain their claim for damages, which evidence the plaintiff did not attempt to rebut. Judgment for plaintiff. Defendants' motion for a new trial was overruled, and they prosecuted a proceeding in error.

H. L. Burgess and Parker & Hamilton, for the plaintiffs in error.

I. O. Pickering, for the defendant in error.

⁵³ BURCH, J. The fact that one of the sureties, as an attorney at law, conducted the defense of his principals contributed nothing to the effect of the judgment as an estoppel against either himself or his cosureties. So far as he was concerned he might have been limited in making such defense by instructions, or he might have been discharged at any stage of the trial, and, in any event, he was not subject, in the practice of his profession, to the hazard of being personally bound by a judgment against his clients. The rules under which one not a party to the record may be held to have submitted his interest in the litigation are thus summarized in 2 Black on Judgments, section 540: "But in order that this result may be brought about, it is necessary that three conditions be fulfilled. In the first place, the person so intervening in the suit must come in for the assertion or protection of some claim or interest of his own. He must not be a mere intermeddler. . . . Secondly, he must have defended the action avowedly and with notice to the opposite party, and not upon a secret understanding. And thirdly, his interposition must have been so complete that he was practically substituted for the defendant in the management and control of the case. That he employed the attorney who appeared for the defendant of record; that he himself testified as a witness; that he was present and aided in the conduct of the trial; that he cross-examined the witnesses; that ⁵⁴ he lent assistance in money or services to the defendant; that he joins in taking an appeal—none of these circumstances alone is sufficient to make him a party to the judgment."

Since the attorney did not preclude himself from resisting the plaintiff's suit, much less could it be said that, by accepting professional employment, he staked the fate of his cosureties upon a proceeding to which they were not parties, and which they could not defend.

It is claimed, however, that all the facts presented by the record disclose notice to the sureties of the suit against their principals and an opportunity to appear there and urge their defenses, or, at least, an opportunity to move for a consolidation of the actions, and that, failing to avail themselves of these privileges, they are bound by the judgment. In *Graves v. Bulkley*, 25 Kan. 249, 255, 37 Am. Rep. 249, it was said: "To

our mind the better opinion, however, is, that except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit (*Kennedy v. Brown*, 21 Kan. 171), or when he is made privy to the suit by notice, and the opportunity is given him to defend it, a judgment against the principal is not conclusive against the surety."

But this allusion to privity by notice and opportunity to defend can only refer to a practice which does not obtain in this state. The contract of suretyship imposed no duty upon the sureties to defend their principals, gave the principals no right to represent the sureties, and gave one surety no authority, in any capacity, to charge his fellows by either his knowledge or his conduct. In *McConnell v. Poor*, 113 Iowa, 133, 84 N. W. 968, it was said: "Privity, says Greenleaf, denotes mutual or successive ⁵⁵ relationship to the same right of property. Privity in law involves the right of representation, and certainly the principal, in an action against himself alone, may not represent the surety. As was said in *Giltinan v. Strong*, 64 Pa. St. 244: 'The privity of the surety with his principal is in the contract alone, and not in the action.' For the acts or omissions of the principal to which the surety pledges himself in his contract he is bound, and it is only in this respect the principal represents the surety."

There was, therefore, no privity between the principals and sureties with reference to the suit against the principals, and the sureties could not be concluded by its result upon any other notice than process duly served: *Fletcher v. Jackson*, 23 Vt. 581, 592, 56 Am. Dec. 98; *Jackson v. Griswold*, 4 Hill (N. Y.), 522. Nor were the sureties under any obligation to move for a consolidation of the actions after the plaintiff had eliminated the matter originally necessitating the severance. They could abide the status of the case made necessary by the plaintiff's own pleading. It follows that under the decisions of *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249, and *Fay v. Edmiston*, 25 Kan. 439, the judgment against the principals was only prima facie evidence against the sureties in the suit against the latter.

Plaintiffs in error insist that in actions against sureties upon promissory notes a judgment against the principals is not even prima facie evidence against the sureties, and have an abundance of well-reasoned authority to sustain them. In the cases last referred to surety contracts are distinguished into but two classes—those in which the surety obligates himself to be re-

sponsible for the result of the suit, and those in which he does not, and the decisions were made upon contracts of the latter character. Long time ⁵⁶ and earnest consideration were given the subject when these opinions were rendered. They have remained the law for twenty-one years, and the question will not now be re-examined or the rule there announced be disturbed.

That which is designated as finding of fact No. 15 is not a finding of fact at all, but a conclusion of law as to the effect of the demurrer in the original action, and as such is erroneous. The defendants below did not decline to litigate "any question" which might arise upon the lease; they only declined to litigate a liability which could not in any event fall upon them. As simple sureties upon the note they could not, in addition, be bound to respond in damages for the conduct of their principals under the lease. They assumed no such obligation, and had the right to be severed from such contest. The demurrer extended no further, and they could not be concluded beyond its terms. They were still at perfect liberty, in the separate action against them, to plead any fact which the principals might plead to defeat the plaintiff's demand, and their assertion of a claim for damages in favor of the principals for that purpose was nowise inconsistent with their refusal to be implicated in a suit for damages against the principals which was foreign to their undertaking.

Upon the issues made by the pleadings the defendants below were entitled to open and close the case. The execution of the note being admitted, judgment must have gone for the plaintiff had no evidence been introduced, and hence the defendants had the right to proceed first in removing the liability appearing against them on the face of the pleadings. While the question could not be of importance upon the evidence as it finally stood, still, as a matter of practice, ⁵⁷ the defendants should have been allowed the privilege of the rule upon request.

Since the uncontroverted evidence introduced by the sureties was sufficient to overthrow the prima facie case made by the judgment against their principals, the judgment of the district court is reversed, with direction to grant a new trial.

All the justices concurring.

How Far a Judgment Against a Principal is binding upon his sureties is a question upon which the law is not well settled. The subject is discussed at length in the monographic note to Charles v. Hoskins, 83 Am. Dec. 380-390, and the subsequent cases of Martin v. Buffalo, 128 N. C. 305, 85 Am. St. Rep. 679, 38 S. E. 902; Botkin v. Klein-

schmidt, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563; Meyer v. Barth, 97 Wis. 352, 65 Am. St. Rep. 124, 72 N. W. 748; Deegan v. Deegan, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360; St. Joseph v. Union Ry. Co., 116 Mo. 636, 38 Am. St. Rep. 626, 22 S. W. 794; Grommes v. St. Paul Trust Co., 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820; Gibson v. Robinson, 90 Ga. 756, 35 Am. St. Rep. 250, 16 S. E. 969; Douglass v. Ferris, 138 N. Y. 192, 54 Am. St. Rep. 435, 33 N. E. 1041; Pasewalk v. Bollman, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

JOHNSON v. BOEHME.

[66 Kan. 72, 71 Pac. 243.]

REPLEVIN.—A Judgment for the Defendant for Costs, but Saying Nothing About the Return of the Property to Him in an action of replevin in which possession had been taken by a sheriff does not preclude the plaintiff from maintaining a subsequent action against the sheriff for the possession of such property. It is optional with the defendant in an action of replevin whether he will take a judgment for the return of the property or leave it to the result of some subsequent action. (p. 358.)

Prigg & Williams, for the plaintiff in error.

Frank L. Martin and George A. Vandever, for the defendant in error.

CUNNINGHAM, J. An action in replevin was brought in which thirty head of cattle belonging to the defendant in error, Boehme, were taken by the sheriff, the plaintiff in error. Boehme was not a party to that action. He, however, employed attorneys to defend in the name of the defendant in that action, such defendant being Boehme's agisting bailee. In that action Boehme's bailee recovered his costs, but no judgment was entered awarding the possession of the cattle to him or ascertaining their value, and awarding judgment for the same in case a return of the ⁷³ cattle could not be had. There is, however, no claim whatever made that the cattle were not Boehme's and were not wrongfully taken by the sheriff in the replevin action. The cattle were turned over by the sheriff to the plaintiff in the replevin action, and never redelivered either to Boehme or his bailee, from whose possession they were taken. The present action was brought by Boehme against the sheriff to recover the value of the cattle and for damages occasioned by the alleged wrongful and oppressive conduct of the sheriff in taking them from the possession of the bailee. The petition contained

a history of the original case, and upon the trial copies of all papers in that case and the journal entry of the judgment therein were introduced, and also evidence pro and con upon the question whether the cattle belonged to Boehme and whether the plaintiff in the original replevin action had any claim on them.

It was claimed in the court below, and the claim is now made here, that, inasmuch as Boehme, although not a party to the original replevin proceeding, litigated, in the name of the agisting bailee, the right of the plaintiff in that action to the possession of the cattle, and, content to stop with a judgment for costs in his behalf, did not insist upon an order in the alternative for the return of the cattle, or judgment for their value if a return could not be had, he cannot now maintain this action for the recovery of their value, the former judgment being *res judicata* upon that question, as it might have been passed upon, although it was not. This question was raised in various ways by the plaintiff in error in the court below, and is the only meritorious one in the case. The court below took the opposite view and gave judgment for the plaintiff, to reverse which the defendant is now here.

⁷⁴ Section 185 of the code (Gen. Stats. 1901, sec. 4619) provides that, in actions in replevin, if the property has been delivered to the plaintiff and defendant claims a return thereof, judgment may be had for a return of the property, or the value thereof in case a return cannot be had. Admitting, for the sake of the argument, that Boehme, by reason of the fact that he employed attorneys to defend his bailee, is bound by the judgment the same as though he had been a party to the action, the question is, Must a party defendant in a replevin action, where the taking is adjudged unlawful, procure judgment to be entered in the alternative in his behalf as provided in this section, or in default thereof be forever remediless? In other words, is this matter *res judicata*, upon the theory that what might have been determined, but was not, must be held to have been waived or determined against the defendant?

It will be noted that the language of the statute is permissive only. Judgment may be had. We think this leaves the matter entirely optional with the defendant as to whether he will take this additional order and judgment or leave it to the result of some subsequent action. The right to have value fixed was not given to the failing, but to the prevailing, party, and was in his interest. He may be prepared to go into this question in the replevin action, or he may not. He has had his property wrong-

fully taken from him. It scarcely lies in the mouth of a wrongdoer, when sued in a subsequent action, to say that the plaintiff did not take all of the relief to which he was entitled in the former case.

At common law an action in replevin tested only the right of possession of the replevied property at the time of the commencement of the action, and provided ⁷⁵ no method whereby the defendant might have judgment for the value of his property in case the adjudged return thereof could not be had, but left the successful defendant to another action in another form to procure such relief. "In our action of replevin the judgment is in the alternative. This was not so in a common-law action of replevin": *Wilson v. Fuller*, 9 Kan. 176, 191. But under our statute, as is the case under most statutes of replevin, an additional or cumulative remedy to that found in the common law has been provided, and now the defendant may have judgment not only for his costs and for a return of his wrongfully detained property, but, if he choose, also in the alternative, for the value of such property. This is a new remedy given him, and it is well established that in such cases the one on whom such new remedy is conferred may elect which course he will pursue. He need not avail himself of the new unless he chooses so to do, and, if he does not, he is not estopped from pursuing the old: 7 Ency. of Pl. & Pr. 373.

Section 184 of the code provides that in case the replevied property has been delivered to the plaintiff and he failed to prosecute his action to final judgment, the defendant may proceed to inquire into the right of property and right of possession. In the case of *Manning v. Manning*, 26 Kan. 98, the plaintiff, having so obtained the property, dismissed the action, but the defendant did not exercise the right given under this and the following section of having the right of property and its value determined; yet this court there ruled: "While the defendant in a replevin action has a right, notwithstanding dismissal by the plaintiff, to an inquiry and adjudication in that action of his claims to and interest in the property replevied, and in case he avails himself of this right can collect no ⁷⁶ more from the sureties on plaintiff's bond than is awarded by such adjudication, yet this is not his only remedy, for after a voluntary dismissal by the plaintiff he may commence an independent action on the bond, and recover therein all his damages sustained by the taking of the property, including therein, if the title be in him, the value of such property."

The court stated in the body of the opinion that while the defendant, after the dismissal by the plaintiff, had a right to insist upon a trial and judgment in his favor, notwithstanding the dismissal, and in such trial his rights would be determined, yet, if he did not seek such trial and judgment in that action he would not be precluded from seeking his remedy against the attaching plaintiff.

In *Bank v. Morse*, 60 Kan. 526, 57 Pac. 115, it was held that, as against a bondsman in a replevin action, where the suit had been tried out and judgment rendered in favor of the defendant for his costs only, an action on the bond could not be maintained, because the condition therein was that the plaintiff should duly prosecute the action, pay all costs and damages assessed against him, and return the property if a return should be adjudged. This, however, in no sense is a holding that an action could not be maintained against the wrongdoer himself. The view that he may maintain such action is sustained by section 1159 of *Cobbey on Replevin*, second edition; *Schley v. Hale*, 1 Tex. App. Civ. Cas., sec. 391; *Moore v. Gammel*, 13 Tex. 120; and we think the trial court was correct in so holding. The judgment will be affirmed.

All the justices concurring.

When Replevin or claim and delivery is sustainable is the subject of a monographic note to Sinnott v. Feiock, 80 Am. St. Rep. 741-767. That a judgment in replevin may be in the alternative, see Marks v. Willis, 56 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526; Hall v. Law etc. Trust Co., 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643.

COLLINS v. STATE.

[66 Kan. 201, 71 Pac. 251.]

A WRIT OF ERROR CORAM NOBIS is Never Granted to relieve from consequences arising after the judgment. The unvarying test of the right to the writ is mistake or lack of knowledge of facts inhering in the judgment itself. (p. 361.)

A WRIT OF ERROR CORAM NOBIS Cannot be Employed to obtain relief from the misfortune of being unable to prosecute an appeal for the correction of errors of law. Hence, it cannot be granted on the ground that the defendant was prevented from appealing his case because of his inability to make up a record embodying his exceptions within the time allowed by law. (p. 362.)

Hayden & Hayden and Welch & Welch, for the plaintiff in error.

Galen Nichols, county attorney, for the state.

202 DOSTER, C. J. This was a proceeding in error coram nobis, begun in the district court, to vacate a judgment of conviction of John H. Collins of the crime of murder, and to secure for him a retrial. The court below denied the writ, and from its order of denial this proceeding in error has been instituted.

The sole ground upon which a claim of right to the writ is based is that Collins was prevented from appealing his case to this court because of his inability to make up a record embodying his exceptions to the rulings of the court trying him, and showing the errors committed against him, within the time allowed by law for perfecting and filing such record. That, however grievous the hardship, does not constitute a reason for the issuance of the writ of error coram nobis. That writ lies only to correct the record of the trial itself in matters of fact existing at the time of the pronouncement of the judgment, in respect of which the court was unadvised, but had it been advised the judgment would not have been pronounced. The unvarying test of the writ coram nobis is mistake or lack of knowledge of facts inhering in the judgment itself. It has never been granted to relieve from consequences arising subsequently to the judgment. In *State v. Calhoun*, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38, it was allowed in order to relieve from the consequences of a plea of guilty made through duress of fears induced by threats of mob violence. In *Asbell v. State*, 62 Kan. 209, 61 Pac. 690, it was denied for the reason that the

facts on which the application was predicated were known during the progress of the trial, or were available on motion for new trial, or, if not known in ²⁰⁸ time for use on motion for new trial, would be merely cumulative upon facts which were known at that time. In that case it was held: "The office of the writ of error coram nobis is to bring to the attention of the court, for correction, an error of fact—one not appearing on the face of the record, unknown to the court or the party affected, and which, if known in season, would have prevented the rendition of the judgment challenged."

In *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658, the writ was denied as a means of relief from prejudicial matters occurring before and on the trial, such as inability to learn and present facts entitling the party to a change of venue, ignorance or unfaithful conduct of his attorney, etc. The court, among other things, said: "The application for a writ of error coram nobis must show that, if the facts upon which the error is predicated had been presented to the trial court, the judgment complained of could not have been entered."

All the decisions are to the effect that the writ lies only to correct errors of fact, in ignorance or disregard of which the judgment was pronounced, to relieve from which no other remedy exists. None of the courts has used it to relieve from the misfortune of being unable to prosecute an appeal for the correction of errors of law. We cannot allow it to be used for such purpose. We cannot invent forms of procedure to relieve unfortunate suitors.

The judgment of the court below will be affirmed.

All the justices concurring.

WRITS OF ERROR CORAM NOBIS AND WRITS OF ERROR CORAM VOBIS.

- I. Difference Between Writs of Error, Writs of Error Coram Nobis, and Writs of Error Coram Vobis.**
- II. Writs of Error Coram Vobis, Authority of the Courts of this Country to Issue.**
- III. Whether Writs of Right.**
- IV. At Whose Instance and Against Whom the Writ may Issue.**
- V. Questions of Practice.**
 - a. The Petition or Affidavit.**
 - b. The Notice of the Application.**
 - c. Pleadings in Opposition to the Writ.**
 - d. The Trial of the Issues Which may be Presented and Contested Thereon.**
 - e. The Judgment.**

VI. In What Cases a Writ may and may not Properly Issue.**a. Because of Errors of Law.****b. Error of Fact.****1. General Rule.****2. Errors of Fact Relating to the Death or Disability of a Party.****3. Errors of Fact Through Which a Party has Failed to Prosecute or Defend an Action.****4. Errors of Fact in Criminal Proceedings.****5. Errors of Fact in the Issuing of Process.****VII. Negligence or Laches as a Bar to the Writ.****VIII. Obsolescence of the Writ.****I. Difference Between Writs of Error, Writs of Error Coram Nobis, and Writs of Error Coram Vobis.**

“Writs of error coram nobis and coram vobis have frequently been treated as identical. The object sought by such writ is the same; but the method of seeking it is different. The former writ issued out of the court where the error was alleged to have occurred, and was returnable before the same court. It recited that ‘because in the record and proceedings, and also in the rendition of the judgment of a plea in our court before us, it is said a manifest error hath happened’; and it then directed the judges to inspect the ‘record and proceedings which before us now remain, and to do what of right ought to be done to correct that error.’ The latter writ was made returnable before some superior tribunal, and required the record and proceedings to be certified to such tribunal for its revisory action”: Freeman on Judgments, sec. 94; *Camp v. Bennett*, 16 Wend. 48. “There appears to be much confusion and great want of discrimination in the books as to the distinctive features and appropriate offices of a writ of error, a writ of error coram nobis, and a writ of error coram vobis. When the object of the writ is to remove a judgment from an inferior into a superior court for review, and the correction of errors of law or fact, it is called a writ of error only—nothing more. But when the object of the writ is to correct an error of fact in the same court that rendered judgment, it is called a writ of error coram nobis, if it be in the king’s bench, and a writ of error coram vobis if it be in the common pleas. The writs coram nobis and coram vobis differ from a writ of error in two particulars: 1. They contain no certiorari clause, for there is no record to be certified; 2. They have no return day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact, and for errors in the process, or through the default of the clerk. They do not lie when the error is in the judgment of the court itself, and not in the process. The writ is called a writ of error coram nobis in the king’s bench, because the record and proceedings are stated in the writ to remain before us (coram nobis); that is, in the king’s bench. The king, by a fiction of law, is supposed to be present in person in that court. In the common

pleas, where the king is not supposed to preside, it is called a writ of error coram vobis, because the record and proceedings are stated in the writ to remain before you (coram vobis); that is, the king's justices. In the king's bench, the writ coram nobis also lies on the judgment of an inferior court, after the record has been removed into that court by a writ of error that has been quashed, or has abated—the writ in that court, in such a case, answering all the purposes of a second writ of error. The reason of this is, that the record of the inferior court, and not a transcript of the record, is returned, or is supposed to be, although the transcript only is sent up'': *Teller v. Wetherell*, 6 Mich. 45. Practically the difference between a writ coram nobis and one coram vobis in this country, in so far as the two writs may remain a part of our remedial procedure, is that that the former issues out of, and is directed to, the court where the judgment or other proceeding from which relief is sought was rendered or has taken place, and is in effect a command from that court to itself to grant relief from its own judgment or proceeding: *Asbell v. State*, 62 Kan. 209, 61 Pac. 690; *Land v. Williams*, 12 Smedes & M. 362, 51 Am. Dec. 117; *Boughton v. Brown*, 53 N. C. 593; *Ledgerwood v. Pickets*, 1 McLean, 143, Fed. Cas. No. 8175; while the writ of coram vobis issues out of a superior court and is directed to an inferior court. Otherwise the purpose is the same as that of the writ coram nobis. Nor does a superior court, though acting with respect to the judgment or proceedings of an inferior court, exercise a strictly appellate jurisdiction. At least, it does not proceed upon the assumption that the inferior court may have erroneously determined some question of law or of fact presented to it for decision, but, on the other hand, inquires respecting some matter of fact alleged as a ground for relief which was not presented for decision in the subordinate court.

II. Writs of Error Coram Vobis, Authority of the Courts of this Country to Issue.

Very rarely, indeed, in the United States, have writs of the character here under consideration been issued by the appellate or superior courts, and hence the great majority of opinions to be encountered in our reports relate only to writs of error coram nobis. There appears, however, to be no doubt of the power of an appellate or superior court to issue a writ coram vobis, provided the grant of jurisdiction to it by the constitution or laws of the state invests it with power to try the issues presented by such a writ. Hence, the writ has been issued by those superior tribunals which deemed themselves possessed of this jurisdiction: *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Teller v. Wetherell*, 6 Mich. 46; *Arnold v. Sandford*, 14 Johns. 417; *People v. Common Pleas*, 20 Johns. 22; *Higbie v. Comstock*, 1 Denio, 652; *Smith v. Kingsley*, 19 Wend. 620; and, on the other hand, has been refused by such of these courts as regarded themselves as vested with the power to entertain

and determine assignments of error of law only: *Land v. Williams*, 12 Smedes & M. 362, 51 Am. Dec. 117; *Fellows v. Griffin*, 9 Smedes & M. 362; *Calloway v. Nifong*, 1 Mo. 159; *Ex parte Toney*, 11 Mo. 662; *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Davis v. Packard*, 6 Wend. 327. We shall not here enter upon any inquiry for the purpose of ascertaining which of our several superior or appellate courts have authority to entertain, try, and determine issues of fact, and may therefore grant relief by writ of error coram vobis; nor shall we make any further inquiry respecting that writ, for we believe that whatever may be affirmed concerning writs coram nobis is equally true of writs coram vobis, provided they are issued by or sought in a superior court having under the constitution and laws of the state the requisite authority to consider and determine the issues presented.

III. Whether Writs of Right.

The authorities speak of a writ for errors of fact not being a writ of right: *Smith v. Kingsley*, 19 Wend. 620; *Ferris v. Douglas*, 20 Wend. 626; *Higbie v. Comstock*, 1 Denio, 652; *Comstock v. Van Schoonhoven*, 3 How. Pr. 258; *Tyler v. Morris*, 2 Dev. & B. 487, 34 Am. Dec. 395; *Crawford v. Williams*, 1 Swan, 341; *Birch v. Triste*, 8 East, 414; and thus tend to produce the impression that the court has a discretion whether it will grant the writ or not. Perhaps what the courts have meant to affirm is, that the writ does not issue on a mere demand for it, that an affirmative showing must be made either by affidavit or verified petition, and from such showing, and not from a mere demand for the writ, the courts will determine whether it shall issue; and furthermore, that the issuing will be refused if it appears that the writ is sought for delay or merely to embarrass the party to the judgment or proceeding or for any other improper or inequitable purpose. On the other hand, some of the decisions support the inference that the court to which application is made for the writ has a discretion to deny it, and that such discretion will not be reviewed in the appellate court: *Tyler v. Morris*, 4 Dev. & B. 487, 34 Am. Dec. 395; *Wood v. Colwell*, 34 Pa. St. 92.

IV. At Whose Instance and Against Whom the Writ may Issue.

The writ can issue only at the instance of a party to the judgment or one in privity with such party, or who is otherwise injured by the judgment against which relief is sought: *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253. It is said that where there are two or more parties bound by a judgment, the writ must be prosecuted by or against all: *Cook v. Conway*, 3 Dana, 454; but the case was one in which there were two parties defendant, and relief was sought because of an error of fact as to one only, he being the only applicant for the writ, and the granting of relief being confined to him. The result was to leave the judgment in force against the other defendant when, because of the joint nature of the cause of action attempted.

to be asserted against both, the judgment should have been vacated as against both, if vacated against either. In *Roughton v. Brown*, 8 Jones, 393, it was said that the rule obtaining with respect to other writs of error, namely, that a writ of error must be brought in the names of all the parties to a judgment; and if one or more of them be unwilling to join in it, there must be summons and severance as to each of the objecting parties, does not apply to writs of error coram nobis, and at all events, that there is no necessity of a defendant joining or being joined in an application for a writ when he is not interested in the reversal of the judgment.

V. Questions of Practice.

a. **The Petition or Affidavit.**—As heretofore stated, the writ does not issue upon a mere demand for it. There must be an affidavit or verified petition disclosing the grounds upon which the writ is sought, or, in other words, stating the error of fact on account of which the right to the writ is claimed: *Smith v. Kingsley*, 19 Wend. 620; *Ferris v. Douglass*, 20 Wend. 626; *Maher v. Comstock*, 1 How. Pr. 175. In some of the states the practice prevails, after the filing of such petition or affidavit, of making a formal assignment of the errors upon which the applicant relies. The granting the writ must, nevertheless, be supported by the petition therefor, and no defects therein can be remedied by the assignment of errors, nor can it enlarge the grounds upon which relief is sought: *Williams v. Clay*, 5 Litt. 56; *Elliott v. McNairy*, 1 Baxt. 342; *Gallena v. Sudheiner*, 9 Heisk. 189.

As to the contents of the petition or affidavit, it is sufficient for our present purpose to state that they must disclose some proper cause for the issuing of the writ, or, in other words, must specify some matter of fact which, had it been known to the court, would have prevented the rendition of the judgment complained of: *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Dunnivant v. Miller*, 1 Baxt. 227; *Hicks v. Haywood*, 4 Heisk. 598; and where the writ is sought on the ground that the defendant in the action suffered the judgment because of his mistake or excusable neglect, or because of any matter justifying the vacation of the judgment, the petition must allege the existence of facts necessary to excuse the negligence, or to show that, in the mistake from which the applicant has suffered, he was not guilty of such negligence or inattention as to charge him with laches and thereby prevent the granting of relief to him: *Thurston v. Belote*, 12 Heisk. 249. Where the writ is issued in a criminal case for the purpose of escaping the effect of a conviction, upon the ground that it is the only method by which the accused may bring before the court some new fact, the affidavit or petition should be free from all vagueness and show clearly that but for the fact presented as a ground for the writ the conviction could not have occurred: *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975; *Holt v. State*, 78 Miss. 631, 29 South. 527.

b. **The Notice of the Application.**—Usually notice of the application for the writ is required to be given to the party to be affected thereby: *Mears v. Garretson*, 2 G. Greene, 316; *Maher v. Comstock*, 1 How. Pr. 175; *Ferris v. Douglass*, 20 Wend. 626; *Comstock v. Van Schoonhoven*, 3 How. Pr. 258; *Hicks v. Haywood*, 4 Heisk. 598; though in one state it is said that such notice is required only when the writ is intended to operate as a supersedeas: *Combs v. Carter*, 1 Dana, 178.

c. **Pleadings in Opposition to the Writ.**—If the affidavit or petition does not disclose an error of fact sufficient to warrant the issuing of the writ, it has been said that no pleading in opposition thereto is necessary or proper, but if a demurrer be interposed, it may be regarded as mere surplusage: *Landsdale v. Findley*, Hardin, 158. Doubtless, if the affidavit or petition on the part of the applicant does not disclose any error of fact, the writ ought not to issue merely because no response is made thereto. In truth, however, the practice at the common law appears to have been to issue the writ, or to give an order directing such issuing, and no responsive pleading was entertained until a later date, and then the plea, if the statements of the plaintiff in error were regarded as insufficient to justify the issuing of the writ, was in the nature of, and at least had the same effect as a demurrer. “The writ being granted, the plaintiff in error makes a formal assignment of errors, in the nature of a declaration, stating the errors of fact relied upon; and to this assignment the defendant may plead or demur. The common plea in error is, in nulla est erratum, which admits the fact to be as alleged, and insists that in law it is not error, and the matter of law arising upon this plea or upon demurrer is, of course, referred to the judgment of the court. If the defendant would deny the truth of the error in fact assigned, he must traverse the same by plea and take issue thereon; or, if the case requires it, he may plead specially any matter in confession and avoidance, as a release of errors, the statute of limitations, etc., to which the plaintiff in error may reply or demur as may seem proper”: *Crawford v. Williams*, 1 Swan, 342; *Goodwin v. Sanders*, 9 Yerg. 91.

Among the defenses available in opposition to the writ is one that the application has not been made in time, either on the ground that some statute of limitations has become operative, or that the time allowed by some rule of court has expired. If the defense of the statute exists, it must be pleaded: *Eubank v. Rall*, 4 Leigh, 508. In some of the states there is no statute limiting the time within which the writ may be sought: *State v. Calhoun*, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38; *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408; and it appears that limitations of time for prosecuting writs of error are inapplicable to writs coram nobis: *Strode v. Stafford Justices*, 1 Brock. 162, Fed. Cas. No. 13,537. In Tennessee the writ must not

issue unless applied for within a year after the rendition of the judgment: *Elliott v. McNairy*, 1 Baxt. 342.

d. **The Trial and the Issues Which may be Presented and Contested Thereon.**—The issues presented must be tried and determined as are like issues in other cases. Issues of law relating to the sufficiency of the alleged errors of fact to entitle the applicant to relief are, of course, heard and determined by the court like other issues of law and without receiving evidence. Where there is any issue of fact, it must be tried: *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Landers v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Cook v. Conway*, 5 Dana, 454; and if the parties demand, by a jury: *Fellows v. Griffin*, 9 Smedes & M. 362. Where, as is commonly the case, writs of *coram nobis* do not issue, but motions are entertained as substitutes therefor, the usual practice is to determine issues of fact in the same manner as like issues are determined when arising on other motions, namely, by the court on affidavits and without a jury: *Consolidated etc. Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600. The issues which may properly present themselves for trial do not involve or permit a re-examination or retrial of any issue of law or fact which was expressly or impliedly presented for decision by the court before rendering the judgment from which relief is sought. Doubtless the complaint on which the judgment is based will not be considered for the purpose of determining its legal sufficiency, and the pleadings will not be looked into for the purpose of considering the nature of the cause of action or of defense and of withholding relief if found not to be equitable or meritorious: *Higbie v. Comstock*, 1 Denio, 652. The record of the case in which the judgment was pronounced cannot be contradicted; the errors assigned must be consistent with it. Hence, the trial cannot involve the hearing of evidence to show that the statements of such record are false: *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Williams v. Edwards*, 12 Ired. 118. This rule applies when an attempt is made to attack a sheriff's return of the service of a writ of notice: *Shoffet v. Menifee*, 4 Dana, 150; *Bolling v. Anderson*, 1 Tenn. Ch. 127. The whole matter at issue involved in the original trial is not opened for a new trial, but only the questions presented relating to alleged errors of fact: *Breckinridge v. Coleman*, 7 B. Mon. 331. Conflicting evidence will not be heard relating to the existence of the cause of action or of the ground of prosecution upon which the judgment in a civil action or a criminal proceeding was founded: *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Memphis etc. Inst. v. Hargan*, 9 Heisk. 496. Hence, relief from a conviction cannot be procured by a writ *coram nobis* on the ground that proof can be made that another person committed the crime: *Howard v. State*, 58 Ark. 229, 24 S. W. 8; or that the prosecuting witness has since the trial admitted that his testimony was materially false: *State v. Superior Court*, 15 Wash. 339, 46 Pac. 399, or that the accused has since his trial and conviction discovered new evidence establish-

ing his innocence: *Howard v. State*, 58 Ark. 229, 24 S. W. 8; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Bingham v. Brewer*, 4 Sneed, 452.

c. **The Judgment.**—The judgment which follows the trial “is that the judgment complained of be affirmed or recalled, according as it may be for the defendant or the plaintiff; and if for the latter, then the suit is placed in the same situation as it was before the judgment was entered: *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Fellows v. Griffin*, 9 Smedes & M. 362; *Camp v. Bennett*, 16 Wend. 48.

VI. In What Case a Writ may and may not Properly Issue.

a. **Because of Errors of Law.**—What we have already said indicates that a proceeding by writ of error coram nobis is not of the same character or for the same purpose as an appeal or writ of error prosecuted to an appellate judicial tribunal for the purpose of reviewing the proceedings of a subordinate court. Where the remedy by appeal or writ of error exists, it should be resorted to, and if such resort is not sought, relief cannot be had by writ of coram nobis. Nor is the rule otherwise though no appeal or writ of error is allowable from the judgment complained of, provided the ground on which the applicant seeks relief is a mere error of law which would have been a proper matter for review had a writ of error or appeal been allowable. Hence, the writ coram nobis cannot be successfully prosecuted to obtain relief on the ground that the court, in some ruling or decision, committed an error of law to the prejudice of the applicant and without which such ruling or decision would not have been made, nor is it material whether such supposed error appears on the face of the record or from an inspection of the judgment: *Hawkins v. Bowie*, 9 Gill & J. 428; *Patterson v. Arnold*, 4 Cold. 364; *Upton v. Phillips*, 11 Heisk. 215; *Richardson v. Jones*, 12 Gratt. 53; *United States v. Plummer*, 3 Cliff. 28, Fed. Cas. No. 16,056.

b. Error of Fact.

1. **General Rule.**—The exclusion of errors of law from the causes on account of which a writ coram nobis may issue leaves as the only ground of such a writ errors of fact: *Maple v. Havenhill*, 37 Ill. App. 311; *McKinney v. Western etc. Co.*, 4 Clarke, 420; *Hawkins v. Bowie*, 9 Gill & J. 428; *Brindendolph v. Zeller*, 3 Md. 325; *Fellows v. Griffin*, 9 Smedes & M. 362; *Higbie v. Comstock*, 1 Denio, 652; *Patterson v. Arnold*, 4 Cold. 364. The use of the expression, errors of fact, in connection with this writ is too well calculated to produce the impression that its office may be the correction of errors in conclusions drawn by the jury, or the court sitting as such, from evidence adduced at the trial. But the proceeding is not for the purpose of revising a decision made by the court or jury upon evidence produced or facts conceded to exist, but to prevent the carrying into effect of a judgment or the enforcement of process rendered or issued without considering, and in ignorance of, some fact which, if known,

would have prevented the rendering of the judgment or the issuing of the process. If the alleged error of fact is one which appears on the face of the record, relief, if obtainable, must be sought by appeal or writ of error, and hence cannot be secured by prosecuting a writ coram nobis: *Le Bourgeoise v. McNamara*, 10 Mo. Ap. 116; *Upton v. Phillips*, 11 Heisk. 215.

2. Errors of Fact Relating to the Death or Disability of a Party.—If by the rules obtaining in a state, it is improper to proceed after the death of a party: *Neilson v. Holmes*, Walk. 261; *Teller v. Wetherell*, 6 Mich. 46; *Calloway v. Nifong*, 1 Mo. 223; *Dugan v. Scott*, 37 Mo. App. 663; *Dows v. Harper*, 6 Ohio, 518, 27 Am. Dec. 270; or against an infant without the appointment of a guardian: *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; or against a married woman without joining her husband: *Latshaw v. McNees*, 50 Mo. 381; and the fact of the death, infancy, or coverture does not appear by the record, a proceeding by writ of error coram nobis is proper for the purpose of calling the attention of the court to the irregularity and obtaining relief from the judgment which has resulted from it. In *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, it was decided that a judgment against a person insane at the time of its rendition could not be avoided by a writ of coram nobis, or a motion in lieu of it, and hence that relief from such a judgment must be sought by a suit in equity. The reasoning of the court appears to us to be entirely inadequate.

3. Errors of Fact Through Which a Party has Failed to Prosecute or Defend an Action.—Where a judgment is suffered by a party without his fault or inexcusable negligence, the practice now generally prevailing is to obtain relief by motion to vacate the judgment, and in many of the states statutes have been enacted specifically appointing the time when, and the circumstances under which, the application for relief may be made and granted: *Freeman on Judgments*, c. 7. Such relief was formerly obtained by a writ of error coram nobis, and in some of the states this writ is still available for this purpose, and in others, while the proceeding is by motion, it is regarded as of the same nature as the proceeding by writ coram nobis, and is controlled by the same rules. Hence, a judgment may be vacated by this writ when its entry was due to the neglect of the clerk to file the defendant's answer: *Jones v. Pearce*, 12 Heisk. 281; or of the plaintiff's attorney in not keeping his promise to file the defendant's plea: *Tucker v. James*, 12 Heisk. 533; or a judgment was entered by default after the cause had been continued to the next term and the plaintiff had therefore left the courtroom: *Crouch v. Mullinix*, 1 Heisk. 478. Generally, it may be said that the proceeding by this writ is proper whenever the failure to prosecute an action or make a defense thereto was not due to the negligence of the party seeking relief: *Crawford v. Williams*, 1 Swan, 341; *Dinsmore v. Boyd*,

6 Lea, 689; McLemore v. Durivage, 92 Tenn. 482, 22 S. W. 207, as where he was prevented by duress from making his defense: Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; State v. Calhoun, 50 Kan. 523, 34 Am. St. Rep. 141, 52 Pac. 38; or the judgment was obtained against him without service of process: State v. Heinrich, 14 Mo. App. 146; Merritt v. Parks, 6 Humph. 332.

4. **Errors of Fact in Criminal Proceedings.**—Proceeding by writ of error coram nobis, in so far as it survives in the United States, is of far greater importance in criminal prosecutions than in civil actions, and may be resorted to for the purpose of calling the attention of the court to any matter of fact not involving the retrial of the merits of the action or of the guilt or innocence of the accused, to which such attention cannot be called by any other proceeding, as that the person, though sane at the time of the alleged offense was committed, was insane at the time of his trial, if the term at which the judgment was entered had closed and it was not within the power of the court to set aside the judgment of conviction on motion: Adler v. State, 35 Ark. 517, 37 Am. Rep. 48. In Indiana and Kansas a conviction may be set aside by writ of error coram nobis when based on the plea of guilty, if it appears that the plea was forced from the accused by well-founded fear of mob violence: Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; Wheeler v. State, 158 Ind. 687, 63 N. E. 975; State v. Calhoun, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38. In Missouri it was held, at an early date, that if a slave was sentenced to the penitentiary as if he were a free person, the fact of his being a slave not being disclosed to the court, such fact may be made available and his release from confinement procured by his master by writ coram nobis: Ex parte Toney, 11 Mo. 661. Later in the same state, it was determined that when a person under the age of eighteen years was sentenced to the penitentiary without his age being disclosed, the statute requiring his imprisonment in the county jail only, such sentence might be vacated by writ coram nobis: Ex parte Gray, 77 Mo. 160. Where the statute of the state provides for the granting of a new trial or other methods of correcting errors in criminal prosecutions, the writ of error coram nobis may supplement, but may not supersede, any of such methods. Hence the writ is not available in any case where the party had a remedy by appeal or motion for a new trial: Asbell v. State, 62 Kan. 209, 61 Pac. 690; Dobbs v. State, 63 Kan. 321, 65 Pac. 658. Nor does a party become entitled to the writ on showing that he was unable, within the statutory limits of time, to prepare his record upon appeal: Collins v. State (principal case), 66 Kan. 251, ante, p. 361, 71 Pac. 251; or that he has discovered new evidence material to his defense: Howard v. State, 58 Ark. 229, 24 S. W. 8; Dobbs v. State, 63 Kan. 321, 65 Pac. 658; Bigham v. Brewer, 4 Sneed, 432.

5. **Errors of Fact in the Issuing of Process.**—There is said to be no doubt that a writ of execution may be quashed by a proceeding

by writ of error coram nobis where the execution was erroneous and illegal: *Phillips v. Russell*, Hemp. 62. In the case cited, the character of the error or illegality is not stated in the opinion of the court or otherwise, and no other case has come within our observation in which this remedy was pursued for the purpose of quashing an execution.

VII. Negligence or Laches as a Bar to the Writ.

Proceedings by writ of error coram nobis are not exempt from the general rule that relief may be denied to a party because of his own negligence or laches. If he knew of the alleged error of fact at the time the judgment was entered and did not avail himself of it, this may preclude him from any subsequent proceeding for his relief. If he seeks relief from a judgment on the ground that it was taken against him by default, when he had a meritorious defense to the action, he may be met, as in other cases of applications to vacate judgments, by the claim that it was his own negligence which caused the judgment to be entered against him, and that it was so inexcusable that he is not entitled to relief: *Dobbs v. State*, 65 Kan. 321, 65 Pac. 658; *Marble v. Vanhorn*, 53 Mo. App. 561; *Jackson v. Milson*, 6 Lea, 514; *Memphis etc. Inst. v. Hargan*, 9 Heisk. 496; *Carney v. McDonald*, 10 Heisk. 232.

VIII. Obsoleteism of the Writ.

The writ of error coram nobis is often stated to be obsolete: *McKindley v. Buck*, 43 Ill. 488; *Life Assn. v. Fassett*, 102 Ill. 315; *Pickett v. Legerwood*, 7 Pet. 144. Doubtless in many of the states it is no longer employed, but that it is entirely obsolete is sufficiently disproved by the citations already made and by *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Hicks v. Haywood*, 4 Heisk. 598; *Swafford v. Howard*, 8 Baxt. 526; *Milan County v. Robertson*, 47 Tex. 222. Probably it is abolished by the provisions of the codes of those states which, departing from the rules of the common law, have enacted what was intended to be a complete code of procedure, and have provided for remedies other than by this writ to accomplish the purposes otherwise sought by it. Where, however, the common law has been adopted and has not been modified by any statute expressly abolishing this writ, or impliedly displacing it by providing other remedies for the same purpose, the writ must be regarded as still available, both in civil and criminal prosecutions: *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *State v. Calhoun*, 50 Kan. 523, 34 Am. St. Rep. 141, 52 Pac. 38.

COLORADO DEBENTURE CORPORATION v. LOMBARD INVESTMENT COMPANY.

[66 Kan. 251, 71 Pac. 584.]

CORPORATIONS—Summons—Service of upon—Return, When Shows Inability to Find the Chief Officer.—A return on a summons that it had been served on the assistant secretary, "the president and chief officer of said company not being found in my county," sufficiently shows the inability to find the chief officer. (p. 374.)

CORPORATIONS.—The Service of Summons on the Assistant Secretary of a Corporation is sufficient, where he is an officer provided for in the by-laws, with independent duties, in which are included the management of the office of the corporation at its only place of business within the state. (p. 374.)

CORPORATIONS—Summons—Service upon Officer Who has Resigned.—The service of a summons on an officer of a corporation who has resigned will be sustained, if the by-laws of the corporation provide that officers shall hold their offices for the time specified or until their successors are elected and qualify, and no successor has been elected. (p. 376.)

Stebbens & Evans and Frank Nighswonger, for the plaintiff in error.

Thomas B. Wall, James V. Daugherty, and James H. Stewart, for the defendants in error.

252 MASON, J. On July 27, 1900, the Colorado Debenture Corporation filed a petition in the district court of Sedgwick county against the Lombard Investment Company, a Kansas corporation. A summons was issued and returned, the return showing service by the delivery of a copy to J. H. Stewart, the assistant secretary of the defendant company. The defendant appeared specially and moved to set aside the service. The motion was heard on an agreed statement of facts and certain written evidence.

The agreed statement showed that the defendant was a Kansas corporation; that for several years prior to August, 1890, it was engaged extensively in business in Kansas, with its chief officer in Kansas City, Missouri; that its by-laws provided for an officer called "secretary," and also for an officer called "assistant secretary"; that among the duties of the latter were keeping a record of the earnings of the company, making the annual statement to the Secretary ²⁵³ of State required by statute, and having charge of the Wichita office; that the by-laws also provided that the officers should hold their respective

offices for the period of one year from the date of their election, or until their successors should be elected and qualified; that on September 7, 1893, J. H. Stewart was elected assistant secretary; that at a directors' meeting on December 6, 1897, all the officers, except the president and four directors, resigned, and orders were made accepting their resignations to take effect at the close of the meeting; that the president was then, and has ever since been, a resident of New York; that the person who had held the office of secretary was then, and has ever since been, a resident of Chicago; that no meeting of the directors has been held since. The evidence showed that the charter named as the places where the business of the company was to be transacted Wichita, Boston, Creston, Iowa, and Lincoln, Nebraska. The district court sustained the motion. The plaintiff now seeks the reversal of this order.

The first objection made to the service is that the sheriff's return did not sufficiently show that the chief officer of the defendant corporation could not be found in the county. The district court, however, held that this contention was not sound, placing the order setting aside the service upon other grounds. We agree in this with the trial court. The statute authorizes a service on an inferior officer, "if its chief officer is not found in the county": Civ. Code, sec. 68; Gen. Stats. 1901, sec. 4498. The language of the return in this respect was: "The president and chief officers of said company not being found in my county." This is a sufficient recital to show inability to find the chief officer: *Cincinnati Hotel Co. v. Central Trust* ²⁵⁴ etc. Co., 11 Ohio Dec. (reprint) 255; *Crowley, Cook & Co. v. Sumner*, 97 Ill. App. 301; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Chicago etc. Electric Co. v. Congdon etc. Mfg. Co.*, 111 Ill. 309.

The next contention of defendant is that service cannot be made on an "assistant secretary" in any event. We hold that, under the circumstances of this case, service on the assistant secretary of the corporation is sufficient. In the syllabus and opinion in *Leavenworth etc. Ry. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346, it was said that such service is good. The statute does not in terms authorize a service on a vice-president, nor does it expressly provide for such an office, yet a service on a vice-president has been held sufficient—in some cases even without a showing that the president could not be found: *Ball v. Warrington*, 87 Fed. 695; *Pond v. National Mortgage etc. Co.*, 6 Kan. App. 718, 50 Pac. 973, and cases cited. In the case of

Pond v. National Mortgage etc. Co., a petition to certify to this court was denied.

The assistant secretary in the case at bar was not a mere deputy. He was an officer provided for by the by-laws of the corporation, with independent duties, which included the management of the office of the company at Wichita, its only place of business within this state. He was, in effect, the secretary of the corporation for Kansas, the state under whose laws it was created.

A more difficult question arises upon the third objection to the service—that it was void for the reason that J. H. Stewart, the assistant secretary, had resigned from that office, and his resignation had been accepted prior to the attempted service. There was an attempt to prove that the resignation was for the very purpose of avoiding service. We cannot say, ²⁵⁵ however, that the evidence established this. It has been held that, where the statute provides that the officers of a municipal corporation shall hold their offices until their successors are elected and qualified, the municipality cannot avoid service of process by the resignation of its officers, where no successors are chosen, and that under such circumstances service may be had on the officer who has resigned, notwithstanding the formal acceptance of his resignation: *Badger v. United States ex rel. Bolles*, 93 U. S. 599. Plaintiff in error seeks to apply the same principle to this private corporation on the ground that the by-laws of its own adoption, providing that its officers shall hold until their successors are elected and qualified, have, as to persons dealing with it, the force of law.

The principle was so applied in *Timolet v. S. J. Held Co.*, 40 N. Y. Supp. 692, 17 Misc. Rep. 556. The statute there involved authorized service on a director. S. J. Held had been a director in the defendant corporation, but he resigned before service. The court upheld the service, saying: "There is no question here of the personal liability of the resigning director to the creditors of the company, but only a question between such creditors and the company, under its own by-laws, and for its own neglect to terminate its official relations with the director, by electing his successor. When, by its by-law, it declares that he shall serve until his successor is chosen, it constitutes him its officer until that event, with the same effect, so far as the corporation is concerned, as if he were serving in the term for which he was elected, and had not resigned. It was in the power of the company to terminate his agency at any time by

electing a successor, and, if it chose rather to continue such agency, he must be treated, in actions against the company, as its duly constituted officer. ²⁵⁶ A by-law of a corporation has all the force of a statute, and is as binding upon the company and its members as any public law of the state. . . . He was a director, by virtue of the law of the company, notwithstanding his resignation, as his successor had not been chosen, and service upon a director was service upon the corporation."

We are satisfied with this reasoning, and hold that the service on J. H. Stewart was sufficient.

The judgment of the district court is reversed, and the cause remanded with directions to overrule the motion to set aside the service of summons.

All the justices concurring.

Service upon an Officer of a corporation after he has tendered his resignation does not bind the corporation, as a rule, although his resignation has not been accepted. But if the by-laws of the company provide that directors shall serve until their successors are appointed, service upon a director who has tendered his resignation, but whose successor has not been appointed, is binding on the corporation: See the note to *Zeltner v. Zeltner Brewing Co.*, 95 Am. St. Rep. 578-581.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY v. LITTLE.

[66 Kan. 378, 71 Pac. 820.]

RAILWAY CORPORATIONS—Passengers—On Whose Representations may Rely.—An intending passenger who inquires at a railway station of a ticket agent whether a train stops at another station, and also of the brakeman apparently in charge of the train, has the right to rely upon the representations and replies made by these employes, and hence to purchase a ticket for, and to go upon, such train for the purpose of being transported to such station. (p. 378.)

RAILWAY CORPORATIONS—Refusal to Stop Trains at a Station.—One who, after purchasing a ticket for a designated station, is ejected from the train because, by the rules of the corporation, it does not stop at such station, may recover damages for such ejection. (p. 378.)

RAILWAY CORPORATIONS—Exemplary Damages.—If a passenger who has purchased a ticket for a designated station, after inquiring of the ticket agent whether the train stops at such station, is compelled to leave the train, on the ground that it does not carry passengers, he may recover exemplary damages, if, in the opinion of the jury, the defendant's employes were guilty either of malice, wantonness, willful oppression or violence, or of gross negligence. (pp. 378, 379.)

DAMAGES for Humiliation and Disgrace in Being Compelled to Leave a Railway Freight Train after taking passage thereon may be recovered, though no one was present at the expulsion but the conductor and a brakeman. Knowledge of such expulsion may reach others, and, if so, this is well calculated to humiliate and disgrace the plaintiff. (p. 379.)

Action to recover damages for being expelled from a railway train. The plaintiff inquired of the station agent at Olathe at what time he could obtain a train for Hillsdale, and was told that he could go on a freight train at a time designated. Not long before the arrival of such train he purchased a ticket of such agent, and entered the train, first telling the brakeman where he wanted to go, and being assured by such brakeman that the train would carry him. The brakeman subsequently took up his ticket, but, after passing two stations, the conductor appeared and insisted that the train did not carry passengers, and ordered plaintiff to leave the car. The plaintiff obeyed. After leaving the car, the brakeman offered to return the ticket, but the plaintiff refused to accept it. The jury returned a verdict for the plaintiff for two hundred and twenty-five dollars and fifty-eight cents, and by their special verdict found he was entitled to fifty-eight cents for expenses, one hundred and seventy-five dollars for exemplary damages, and fifty dollars for humiliation and disgrace.

It appeared that the train boarded by plaintiff was one which the conductor could not stop at Hillsdale without disobeying orders.

Pratt, Dana & Black, for the plaintiff in error.

J. P. Hindman and Parker & Hamilton, for the defendant in error.

³⁸² CUNNINGHAM, J. It is claimed that the railroad company is not liable for any sum whatever, because the plaintiff was riding on a train which, under the rules of the company, was not permitted to stop at Hillsdale, or even carry passengers at all, and that the conductor was required to obey the regulations of the company in running its trains; that the company has the right to make reasonable rules for the running of its trains and the carrying of passengers; that it is not bound to carry passengers on all trains or to stop at all stations, and that the traveling public ³⁸³ must conform to these rules. These claims are without fault, but do not fit the facts of this case. It was shown in the evidence that train No. 27, due in

Olathe at 6:35 P. M., regularly carried passengers, and it appears from finding 5 that this train on which plaintiff took passage did actually arrive there at about that time. The ticket agent, who was the company's representative at Olathe at the time for this purpose, told the plaintiff, knowing where he was going, that the train was coming. Acting on this suggestion, he went to the caboose, and, before getting on, inquired of the company's employé who appeared to be in charge of it, and who afterward took up plaintiff's ticket, if "that freight train would carry him to Hillsdale," and was informed that it would; that it took the place of No. 27, which was the one that ordinarily carried passengers, and he could go to Hillsdale on it.

If all of these representations were untrue, and the train which plaintiff boarded was not, under the rules of the company, scheduled to stop at Hillsdale, there is nothing to show that he had knowledge of such fact. He made all reasonable inquiry of those whom the company had put there to furnish such information to ascertain if he might rightfully enter the train, and acted on the information thus received. He had a right to rely on all of these representations and assurances. They were made by the agents of the company within the scope of their agency, in the execution of their duties, and bound the company. Acting on them, the plaintiff had a right to go upon that train and be carried to the specified destination. To be ejected from the train before this was accomplished was a wrong for which a recovery might be had.

This case is clearly distinguishable from *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54, relied on by the plaintiff in error, where it was held probable that the plaintiff did not take "the next train," as directed by the local agent, or, if he did, opportunity was given him to ascertain the fact that the train upon which he had taken passage did not stop at the station to which he had purchased his ticket, if he had paid attention to the warning of the brakeman to that effect. More than this, it was there held (page 621): "If a passenger has suffered in his business, or been put to expense by the delay or refusal of the railroad company to carry him as promised by its ticket agent, he would be entitled to ample damages therefor."

It is contended, however, that under the circumstances no recovery of exemplary or punitive damages should be allowed. This court has, in *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 402, 5 Am. St. Rep. 766, 16 Pac. 817, laid down the rule

relating to damages for the wrongful expulsion of a passenger from a train, as follows: "If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded." In *Cady v. Case*, 45 Kan. 733, 26 Pac. 448, it was said: "Whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages." This case collects and cites a large number of cases decided by this court to the same point.

The court instructed the jury that, before they could allow exemplary damages, they must find in the transaction complained of either malice, wantonness, willful oppression or violence. The jury must, therefore, have found some one or more of these elements ³⁸⁵ present, and we think the evidence warranted them in so doing. Besides this, the jury specifically found that the acts of the agents of the company were such as would make it "guilty of gross negligence toward the plaintiff." The case was, therefore, under the findings and authorities, one for vindictive damages.

It is further insisted that damages for humiliation or disgrace should not have been allowed, because, at the time of the expulsion, no one was present but the conductor, brakeman and plaintiff, and, the expulsion being thus private, there was no indignity, insult or injury to plaintiff's feelings, by being publicly expelled. We are not disposed to go into a consideration of how much of publicity must accompany a wrong, in order to humiliate or disgrace. A rule could hardly be formulated. What would humiliate one would not affect another. In this case, the plaintiff was on his way to Hillsdale to fill an appointment to make a political speech. He was of necessity compelled to notify the public why he was unable to keep the appointment. It is a matter of common knowledge that he has occupied the office of attorney general of this state, and to have it go out that he had been expelled from a railroad train was certainly well calculated to humiliate and disgrace him, and was an injury for which damages might be awarded.

We find no error in the judgment, and hence must affirm the same.

All the justices concurring.

A Railroad Company is liable in damages for mental suffering to a passenger, apart from injury to his person, caused by his being wrongfully excluded or expelled from its cars: *Mabry v. City Electric Ry. Co.*, 116 Ga. 624, 42 S. E. 1025, 94 Am. St. Rep. 141, and

cases cited in the cross-reference note thereto. And it is, in a proper case, liable to him for exemplary damages: Illinois Cent. R. R. Co. v. Harris, 81 Miss. 208, 95 Am. St. Rep. 466, 32 South. 309; Norman v. Southern Ry. Co., 65 S. C. 517, 95 Am. St. Rep. 809, 44 S. E. 83; monographic note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep. 881, 882. See, also, Barker v. Ohio River R. R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148. As to the liability of the company for expelling a passenger from its train when he has a ticket to his destination, but the train is not scheduled to stop there, see Illinois Cent. R. R. Co. v. Harris, 81 Miss. 208, 32 South. 309, 95 Am. St. Rep. 466, and cases cited in the cross-reference thereto; St. Louis etc. Ry. Co. v. Harper, 69 Ark. 186, 86 Am. St. Rep. 190, 61 S. W. 911; monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 85.

MENDENHALL v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

[66 Kan. 438, 71 Pac. 846.]

RAILWAY CORPORATIONS—Passenger, Who is not.—One who pays a brakeman for the privilege of riding upon a train, and is told to get on the platform of a baggage-car and to get off at stopping places for the purpose of keeping out of sight, is not, while riding on such train, a passenger, nor is this rule made inapplicable by the fact that he was only fifteen years of age and did not know he was doing wrong, if it does not appear that he had not ordinary intelligence for his years, or that he lacked capacity to understand the transaction. (p. 381.)

RAILWAY CORPORATIONS—Trespassers on Trains.—If one is on a train, not as a passenger, but as a trespasser, the corporation owes him no duty except to avoid willful and wanton negligence, and therefore is not answerable to him for injuries sustained by his stumbling over a semaphore board which was permitted to remain above the surface of the ground. (pp. 381, 382.)

Nimocks, Swartz & Hess, for the plaintiff in error.

A. A. Hurd and O. J. Wood, for the defendant in error.

⁴³⁸ MASON, J. The only question presented in this case is whether the district court erred in sustaining a demurrer to the petition. The petition alleged that plaintiff, a boy fifteen years of age, agreed with the ⁴³⁹ brakeman of one of defendant's passenger trains to pay him twenty-five cents to carry him from Great Bend to Hutchinson; that plaintiff paid the brakeman this amount and the brakeman told him to get upon the platform of the baggage-car, and to get off at the stopping places on the way for the purpose of keeping out of sight; that plaintiff rode upon the car platform as far as Ellinwood, and in getting off the train while it was still in motion, on the opposite side

from the depot, stumbled over a semaphore board, fell under the train, and received injuries requiring the amputation of both feet. The plaintiff bases his right to recover upon the acts of the brakeman in instructing him to ride on the car platform and to get off at the stopping places for the purpose of keeping out of sight, and upon the negligence of the company in permitting the semaphore board to remain exposed above the surface of the ground.

The demurrer was properly sustained. The plaintiff was not a passenger. It has often been held that one does not become a passenger by the payment of money to the brakeman of a freight train, the collection of fare not being within the real or apparent scope of his authority: *McNamara v. Great Northern Ry. Co.*, 61 Minn. 296, 63 N. W. 726; *Janny v. Great Northern Ry. Co.*, 63 Minn. 380, 65 N. W. 450; *Texas etc. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Atchison etc. R. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Brevig v. Chicago etc. Ry. Co.*, 64 Minn. 168, 66 N. W. 401. Whether the rule is the same in the case of the brakeman of a passenger train or not, the plaintiff in this case was not a passenger, because, in the absence of specific allegations to the contrary, it must be presumed that the fact that he was told to ride on the car platform and⁴⁴⁰ keep out of sight informed him, even if he would not otherwise have known it, that he was not received or considered as a passenger by the company or its authorized agents.

His minority does not affect the matter except so far as it is a mark of capacity: *Bess v. Atchison etc. Ry. Co.*, 62 Kan. 299, 62 Pac. 996. A boy of fifteen, having ordinary intelligence for his age, would presumably understand, under the circumstances stated, that the directions given him were unusual and were intended to prevent his discovery by the person in charge of the train. It is true that the petition alleged that the plaintiff did not know that he was doing wrong in making the arrangements referred to with the brakeman, and that he did not know that he was exposing himself to any great danger in following the instructions given him. But it was not alleged that he had not ordinary intelligence for his age, or that he lacked capacity to understand the nature of the transaction, or that he believed that the brakeman took the money in behalf of the company, or that he did not know that the reason he was told to ride on the platform and keep out of sight was in order that the conductor should not see him. As he was not a passenger but a trespasser, the company owed him no duty with regard to

the construction of its semaphore, or otherwise, except to avoid willful and wanton negligence.

The plaintiff was injured, not because he was riding on the platform, but because he got off the train while it was in motion, and on the other side of the car from the depot. It is not alleged that the brakeman told him to get off before the train stopped. The exact language of the petition in this regard is that the brakeman told the plaintiff "that, as the train pulled up at the different stopping places between Great Bend and Hutchinson, he should get off and keep out of sight." The allegations are insufficient to show defendant to have been guilty of any willful or wanton neglect, or to relieve plaintiff from the responsibility for his own obvious recklessness.

The judgment is affirmed.

All the justices concurring.

A Railroad Company is liable for injuries to a trespasser on its train due to the reckless or wanton conduct of its employes, or gross negligence amounting to willfulness: Illinois Cent. R. R. Co. v. Leiner, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398. It owes to him the duty of ordinary care, though perhaps nothing more: Enright v. Pittsburg etc. R. R. Co., 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938; Bolin v. Chicago etc. Ry. Co., 108 Wis. 533, 84 N. W. 446, 81 Am. St. Rep. 911, and cases cited in the cross-reference note thereto. When there is no lawful contract of carriage, the only right which a person on a train can claim against the carrier is that it shall not willfully or wantonly injure him: McNeill v. Durham etc. R. R. Co., 132 N. C. 510, 95 Am. St. Rep. 641, 44 S. E. 34. As to the liability of a railroad company to a person on its trains at the invitation of employes, see Baltimore etc. Ry. Co. v. Cox, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119; monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 83-85.

FIRST NATIONAL BANK v. GATES.

[66 Kan. 505, 72 Pac. 207.]

NEGOTIABLE PAPER—Title Derived from a Thief.—An innocent purchaser of negotiable commercial paper gets a good title, though he purchased from a thief. (p. 384.)

NEGOTIABLE PAPER.—County Warrants, Though Negotiable in Form, are not negotiable in fact. Hence a purchaser from a thief does not acquire any title. (p. 384.)

Hackney & Lafferty, for the plaintiff in error bank.

C. T. Atkinson, for defendant in error.

⁵⁰⁵ CUNNINGHAM, J. Vawter was president, and Blanchard cashier, of the Bank of Commerce of Newkirk, Oklahoma. The defendant in error, Gates, gave to Blanchard a sum of money with which to purchase for him county warrants. In accordance with this arrangement, Blanchard purchased a Kay county warrant for five hundred dollars, and placed the same, together with other warrants belonging to Gates, in an envelope labeled as Gates' property and left it in the bank vault. This warrant, together with others, was taken ⁵⁰⁶ by Vawter and pledged to the First National Bank of Arkansas City as security for a loan of one thousand dollars. It was, as is usual with county warrants or orders, negotiable in form. The Arkansas City Bank refused to return it to Gates upon his demand, who thereupon brought this action in the court below to recover for its conversion. He had judgment and the bank is here seeking a reversal.

Gates contended in the court below, and contends here, that the warrant in question was wrongfully taken by Vawter, and, as thereby Vawter obtained no title, he could transfer none to the bank. There was conflicting evidence as to whether the warrant had been wrongfully taken by Vawter, but as the jury found the issues in favor of Gates, it was established that he did thus take it. The bank, however, claims that having taken this warrant in the usual course of business for a sufficient consideration, without knowledge of Vawter's wrong, it is entitled to be protected by the law-merchant. The question is, therefore, Is a county warrant, which is negotiable in form, but non-negotiable in the sense that the county issuing it may defend against it, nevertheless negotiable as between successive holders, so that a thief may vest title to it in a bona fide taker of it?

That one so acquiring ordinary commercial paper would be protected is not questioned. An innocent purchaser in good faith of commercial paper gets a good title, even though he purchase from a thief: *Garvin v. Wiswell*, 83 Ill. 215; *Wheeler v. Guild*, 37 Mass. 545, 32 Am. Dec. 231; *Franklin Savings Inst. v. Heinsman*, 1 Mo. App. 336; *Hall v. Wilson*, 16 Barb. 548; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583. This is so because of the law-merchant. Such paper is made free from defenses in the ⁵⁰⁷ hands of such holders in order to facilitate the circulation thereof and thereby promote the transaction of business. But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard.

Municipal warrants, though negotiable in form, are non-negotiable in fact; hence, they are not within the protection of the rule which guards commercial paper. The warrant in question being such an instrument, it was thereby, in the eye of the law, non-negotiable, though as to form, and in other respects, of a negotiable character; it therefore took its place in the list of non-negotiable paper for all purposes. In other words, an instrument non-negotiable between the original parties remains non-negotiable through successive transfers. The bank, knowing that it was non-negotiable, must take and hold it as it would any other non-negotiable paper. Mr. Justice Bradley, in *Mayor v. Ray*, 19 Wall. 468, at page 478, said: "But every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. . . . He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a bona fide holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue."

This language was approved in *Wall v. County of Monroe*, 103 U. S. 74. See, also, *Allen, Bethune & Co. v. McCreary*, 101 Ala. 514, 14 South. 320; *Bank v. Bartlett*, 78 Cal. 301, 20 Pac. 682; *Clark v. Polk County*, 19 Iowa, 248; *Garfield Township v. Crocker*, 63 Kan. 272, 65 Pac. 273. The bank got ⁵⁰⁸ no better title to this property than its assignor possessed, and, as Vawter had none, he could pass none to the bank.

In *People v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63, a county issued an order on its treasurer for the payment of money. The payee indorsed it in blank and lost it. Johnson in good faith

purchased it. The county issued a duplicate order to the payee, and the treasurer paid it. Johnson brought suit to recover on the order which he held. The court said (page 545): "Everyone purchasing such paper is conclusively presumed to know that by his purchase he only acquires the rights of his assignor, whatever they may be, and whether there has been a written assignment or a mere transfer by delivery makes no difference in this respect": See, also, *Young v. Brewster*, 62 Mo. App. 628.

Inasmuch as the county warrant in question was non-negotiable, and Vawter had no authority to dispose of it, the bank took no title to, or interest in, it by receiving it as a pledge. The bank having disposed of it, Gates had a right to recover its value in an action for conversion.

Some other questions as to the giving of instructions and the admission of evidence are raised, but we find no merit in them.

The judgment of the court below will be affirmed.

All justices concurring.

The Authorities are not uniform on the question whether city, town, and county warrants are negotiable: See *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953, and cases cited in the cross-reference note thereto; *People v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63. There may be bona fide ownership of negotiable paper that was stolen from the owner: *Wheeler v. Guild*, 57 Mass. (20 Pick.) 545, 32 Am. Dec. 231; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583; *Manhattan Sav. Inst. v. New York Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079. It has been held otherwise, however, as to paper stolen before it became effective by delivery: *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433, 50 Atl. 896; note to *Bedell v. Herring*, 11 Am. St. Rep. 314.

WEST v. TOPEKA SAVINGS BANK.

[66 Kan. 524, 72 Pac. 252.]

LIMITATIONS, Statute of.—When some prerequisite to the bringing of a suit rests with the claimant, he cannot defeat the operation of the statute of limitations by long and unnecessary delay in taking the antecedent step, and the statute commences to run within a reasonable time after he could, by his own act, perfect his right, which reasonable time in no event extends beyond the statutory time for the bringing of the suit. (p. 388.)

LIMITATIONS, Statute of, in Actions to Enforce Subscriptions to Corporate Stock.—If a Corporation Becomes Insolvent or ceases to do business having debts unpaid, it is the duty of its

directors to enforce payment of subscriptions to its stock, and the statute of limitations, therefore, commences to run against the enforcement of such subscriptions or of any call therefor. (p. 390.)

LIMITATIONS, Statute of.—In an Action to Enforce Subscriptions to Corporate Stock Where the Corporation has not Become Insolvent, nor has It Suspended Business Leaving Debts Unpaid, the statute of limitations does not commence to run until a call has been made for the payment of such subscriptions, or of the part remaining unpaid, and for which the action is brought. (p. 393.)

CONSTITUTIONAL LAW—Amendment of Charters of Banking Corporations.—Under a constitution declaring that corporations may be created under general laws, but that all such laws may be amended or repealed, the pre-existing law relating to banking corporations may be amended so as to provide the time within which subscriptions to their corporate stock must be paid. (p. 395.)

LIMITATIONS, Statutes of—Actions for Subscriptions to Corporate Stock.—Where, by an amendment of the law relating to banking corporations, it is provided that not less than ten per cent of the residue of the capital stock shall be paid in each month after the bank shall be authorized to commence business, the statute of limitations commences to run against the collection of the assessments thus required to be paid in as soon as default in their payment occurs. (p. 395.)

CONSTITUTIONAL LAW—Corporation Stock—Obligation of Contracts.—The legislature may by law provide the time within which the subscriptions to the stock of corporations must be paid, and apply the rule thus prescribed to pre-existing corporations, where such law merely asserts a power which, before its enactment, had been left to the discretion of the board of directors of the corporation. (p. 395.)

CORPORATIONS—Actions on Subscriptions to Stock—Defenses.—If, in an action to enforce a subscription to corporate stock, it appears by the complaint that the call upon which the suit was based was made to raise funds to satisfy a specified debt, the answer must show that such debt has been paid. (p. 395.)

Garver & Larimer and E. A. Austin, for the plaintiff in error.

Overmyer, Mulvane & Gault, for the defendant in error.

525 **BURCH, J.** On May 12, 1901, the Topeka Savings Bank commenced an action against J. G. West to recover on his written subscription to the capital stock of the bank, as follows:

“SUBSCRIPTION TO CAPITAL STOCK OF THE TOPEKA SAVINGS BANK.

“The undersigned, each for himself, hereby subscribes for and agrees to take the number of shares (of the par value of one hundred dollars per share) of the capital stock of the Topeka Savings Bank of Topeka, Kansas, set against his name.

“Each subscription to be paid in installments of ten (10) per centum of the amount thereof, as called for by the board

of directors of said Topeka Savings Bank; provided, however, that at least thirty (30) days shall intervene between calls.

DATE.	SIGNATURE.	ADDRESS.	Shares Taken.	Amount.	Memo.
18-7. N'ch. 30	J. G. West.	Topeka, Kas.	10	\$1,000.	

The petition alleged that the bank was a corporation organized March 11, 1887, for the purpose of receiving and caring for deposits of money; that on ⁵²⁶ March 6, 1896, it ceased to do active business, and borrowed from the Bank of Topeka a sum sufficient to pay all its liabilities, so as to leave the latter bank its sole creditor; and that calls were made on the subscription of West on June 1, 1896, and January 26, 1899, which he failed to pay. Judgment was prayed for the amount in default. The answer contained several defenses, to all of which, except that embodying a general denial, general demurrers were sustained, and the defendant, West, predicates error upon the conduct of the district court in so doing.

The second defense has not been argued either in the brief or at the bar, and need not, therefore, be considered.

The third and fifth defenses may be disposed of together, and are as follows: "3. For a third and further answer and defense hereto, said defendant alleges that said entire contract of subscription set up in said petition, and the total balance unpaid thereon, could, by the terms thereof, have been declared due and called for by the board of directors of the plaintiff in ten months from the date of said subscription, and the whole amount thereof could have been declared due and called for prior to the first day of December, 1892; that this suit was not commenced within five years of said last-mentioned date, and by reason thereof, this action was, at the time of its commencement, wholly barred by the five year statute of limitations."

"5. For a fifth and further answer and defense said defendant alleges that on the second day of March, 1896, said plaintiff, in pursuance of a resolution of its board of directors then passed and adopted, ceased to transact any and all of its usual and ordinary business and permanently closed its doors, and thereafter transacted no business except such as was incident to the winding up of its affairs; that at that time, and for a long time prior thereto, and ever since, ⁵²⁷ said bank was and continued to be wholly insolvent, and it became and was the imperative duty of the board of directors of said plaintiff to have immediately called for the entire amount then unpaid on said subscrip-

tions; that by reason thereof the total amount then remaining unpaid on said contract of subscription became immediately due and payable on March 2, 1896; that this suit was not commenced within five years from said last-mentioned date, and by reason thereof this action was, at the time of its commencement, wholly barred by the five year statute of limitations."

It is established law in this state that when some preliminary action is an essential prerequisite to the bringing of a suit, and such action rests with the claimant, he cannot defeat the operation of the statute of limitations by long and unnecessary delay in taking the antecedent step; and the statute will begin to run within a reasonable time after the party could, by his own act, perfect his right, which reasonable time will not, in any event, extend beyond the statutory time fixed for bringing the suit. This doctrine has been stated and restated, illustrated and illuminated, applied and reapplied, until it has become a truism: *Atchison etc. R. R. Co. v. Burlingame Township*, 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; *Rork v. Commissioners of Douglas Co.*, 46 Kan. 175, 26 Pac. 391; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. Rep. 466; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118; *Commissioners of Graham Co. v. Van Slyck*, 52 Kan. 622, 629, 35 Pac. 299; *Harrison v. Benefit Society*, 59 Kan. 29, 51 Pac. 893; *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239, 65 Pac. 215.

What bearing does it have upon the facts of this controversy? The contest in this case is between the ⁵²⁸ corporation and a stockholder. Under the law the board of directors is clothed with the management of the affairs and business of the corporation. This business is conducted primarily in the interest of the stockholders. The welfare of the corporation however, requires that the obligation of a stockholder to pay the amount of his subscription be enforced, if necessary, against his will. The board of directors, therefore, occupies a dual relation in reference to the stockholder. It is both agent and adversary. It represents and it antagonizes. It protects and it assails.

In the conduct of the corporate enterprise, in choosing methods, in fixing policies, and administering affairs, the board must be held to act on behalf of the stockholder. It represents him. The determination of the extent to which the capital stock shall be embarked falls naturally within the province of those who are charged with the prosecution and success of the undertaking; and in exercising the power vested in it by law, or by contract,

to fix the time and amount of stock calls, the board in a just and proper sense represents the stockholder, as it does in other matters involving judgment and discretion. The stockholder in effect authorizes the board to determine that question for him. Under such circumstances delay in making a call beyond the time in which the board could arbitrarily make it cannot be taken advantage of by the stockholder, and his liability upon his subscription continues to subsist. The character of the relationship excludes the application of the statute of limitations.

The other side of the relation, however, is equally important. In a suit begun in the name of a corporation against a stockholder to compel payment of his subscription, the corporation and the stockholder ⁵²⁹ are antagonists. The making of a call is but a step in the process of collection, and in ordering it the board is not the representative of the stockholder, but of the corporation. From the date of his subscription the relation of the subscriber to the corporation is that of a debtor to a creditor. The power and right to render certain the time and amount of payments pertain to the corporation as creditor, and the exercise of the function is necessarily adverse to the debtor. To such a status the statutes of limitations do apply. This element of antagonism must invade the relations of the parties whenever the primary duty of the board to corporate creditors constrains it to assume, in the name of the corporation, the strict attitude of creditor toward the stockholder as debtor. This may occur upon suspension induced by insolvency, or it may occur upon a voluntary renunciation of all effort to attain the objects for which the corporation was formed, which necessarily precipitates a settlement of corporate affairs. In such cases the board no longer represents the stockholder in reference to his unpaid subscription, but is chiefly concerned with the collection of the debt he owes the corporation, in the interest of creditors. From this time delay is at the risk of the corporation, as of any other creditor, and it must be held to the rule of diligence promulgated in the cases cited, or it could "defeat the purpose of the statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote": *Atchison etc. R. R. Co. v. Burlingame Township*, 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271.

In this case the fact of insolvency became patent March 6, 1896. At that date, at least the primary duty of the corporation lay in the protection of its ⁵³⁰ creditors rather than in the

indulgence of its debtors. It was its duty then to exercise its power and authority and proceed to collect its assets. The status of the parties had become materially changed.

"So long as the corporation is solvent, the whole subscription is due in accordance with its terms, and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated, and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right, but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets for payment of the creditors": *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 73, 47 Atl. 941.

Being insolvent, the duty of the corporation to satisfy its obligations became urgent and imperative. As creditor, it had the power to fix at once its debtor's liability. Delay for a single day was inexcusable, and the statute commenced to run at once.

Without absolute insolvency, the closing of the bank's doors and the cessation of all its usual and ordinary business, with debts remaining unpaid, terminated any representative capacity the board of directors might have fulfilled for the stockholder with reference to his unpaid capital stock while the institution was a going concern. The charter purposes were then abandoned and the parties relegated to their proper status of debtor and creditor as the most important of their relations in the sole remaining business of ⁵³¹ winding up the bank's affairs. From that time unpaid subscriptions were assets for the payment of creditors, and not for the prosecution of the corporate undertaking. The stockholder's liability was properly for so much only of his unpaid subscription as was necessary to pay corporate debts. This liability the corporation should have promptly enforced. No fact appears deterring or impeding it from so doing, or legally excusing the immediate taking of preliminary steps for that purpose. It would not have been unseemly to issue a call before resolving to suspend. The statute, therefore, commenced to run when, by order of the board of directors, the bank suspended.

Much erudition has been brought to bear upon this subject in other jurisdictions. The views set forth above receive some support in principle from the following authorities: *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 47 Atl. 941; *Glenn v. Dorsheimer* (C. C.), 23 Fed. 695; *Glenn v. Dorsheimer* (C. C.), 24 Fed. 536; *Glenn v. Priest* (C. C.), 28 Fed. 907; *Ross-Mehan Brake Shoe F. Co. v. Southern etc. Co.* (C. C.), 72 Fed. 957; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Curry v. Woodward*, 53 Ala. 371; *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 187; *First Nat. Bank of Garrettsville v. Greene etc.*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 90 N. W. 1086, 1091, 94 N. W. 171; *Hatch v. Dana*, 101 U. S. 205.

In Iowa it has been held that, since it rested with the board of directors of the corporation to make the call, delay in making it could not suspend the operation of the statute of limitations, and that such a case fell within the rule established by a series of decisions like those of this court, cited above, holding that when ⁵³² a plaintiff can, at any time, acquire a right to recover against a defendant, the statute of limitations begins to run when he might have done so. Thus, in *Great Western Tel. Co. v. Purdy*, 83 Iowa, 430, 432, 50 N. W. 45, 162 U. S. 329, 16 Sup. Ct. Rep. 810, it was said: "It will be observed that five per centum of the amount of the stock was payable when the subscription was made, and the balance was to be paid as the directors of the corporation should order. It may be assumed that this balance did not become due, and no action to recover therefor could be maintained until such an order had been made. It rested with the corporation, by proper orders and notices, or other acts, to acquire the right to maintain an action. It is the case of a creditor or obligee holding, by the terms of the contract, the power to acquire, by his own act, the right to maintain an action upon the contract. It is plain that this power must be exercised at a just and reasonable time, and not hastened or delayed to the prejudice of the other party. . . . Surely the law will not permit a party, by his own inaction, to defeat the statute of limitations. This statute does not commence to run until an action can be brought; that is, until the plaintiff acquired the right, by the terms of the contract, to commence a suit thereon. It is very plain that, by the terms of the contract, the corporation had the right, at any time, to institute the suit. But that right was to be exercised upon an order for payment and notice thereof. These acts thus pertain to the commence-

ment of the action, being a part of the proceedings for the remedy, and depend upon the exercise of the will of the directors of the company, just as do the issuing of a notice or filing of a petition in the action. Surely, it would be wholly unreasonable to say that the company had not the right to commence an action, for the reason that it had not ordered payment and given notice thereof."

The same rule has been announced in Pennsylvania, ⁵³³ in *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770, affirmed in *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 47 Atl. 941, and approved in *Atchison etc. R. R. Co. v. Burlingame Township*, 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271.

These cases lay stress upon the relations of debtor and creditor to the exclusion of all other considerations. So long, however, as the stockholder does not make a tender of the balance of his subscription, as he may lawfully do at any time (1 Cook on Corporations, sec. 106; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. Rep. 196; *Marsh v. Burroughs*, 1 Woods (U. S.), 463, Fed. Cas. No. 9112), and submits to the conduct of the business by his own agents for that purpose, upon less than the full capital, he ought not to be allowed to repudiate their conduct in order to escape liability when the unpaid balance is required for the satisfaction of corporate debts incurred upon the faith of the whole amount of stock subscribed. The relation is too nearly that of trustee and beneficiary to permit the statute of limitations to be invoked.

By many other decisions it has been declared that the statute does not run at all until a call or authorized demand is made. Among them are the following: *Scovill v. Thayer*, 105 U. S. 143; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Glenn v. Leggitt*, 135 U. S. 533, 10 Sup. Ct. Rep. 867; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. Rep. 914; *Glenn v. Williams*, 60 Md. 93; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Glenn v. Howard*, 81 Ga. 383, 12 Am. St. Rep. 318, 78 S. E. 636; *Gibson v. Columbia etc. Bridge Co.*, 18 Ohio St. 396; *Thompson v. Reno Sav. Bank*, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870; *Washington Sav. Bank v. Butchers' etc.* ⁵³⁴ Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.), 579; *Allibone v. Hager*, 46 Pa. St. 48.

The principle of *Atchison etc. R. R. Co. v. Burlingame Township*, 36 Kan. 626, 59 Am. Rep. 578, 14 Pac. 271, is now so thoroughly engrained in the fabric of our jurisprudence that it is not sufficient in this state to say, with the authorities just cited, that the statute does not commence to run until an unconditional liability is fastened upon the subscriber by a call, or its equivalent. Since the corporation can fix the liability and thereby start the statute, delay in doing so cannot prevent its running. To hold otherwise, and permit the liability of the stockholder to continue for an indefinite period, would defeat the policy underlying the statute. Nor should the statute be subverted by an undue enlargement of the "trust," "sacred," "reserve," and other magnifying adjectives, "fund" theory of corporate assets, or by an undue extension of the representative functions of the board of directors, for the purpose of protecting creditors. In this state creditors have ample remedies. But they, too, are bound by the rule of diligence: *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519; *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984; *McHale v. Moore*, 66 Kan. 267, 71 Pac. 522.

The corporation cannot claim exemption from the statute for the benefit of creditors when creditors are themselves bound by it. It follows, therefore, that the demurrer to the third defense was properly sustained, and that the demurrer to the fifth defense should have been overruled.

535 Under the fourth defense it is claimed that the banking act of 1891 (Laws 1891, c. 43) applied to the plaintiff; that the plaintiff complied with its provisions relating to reports and statements, submitted to examinations, and was given a certificate by the bank commissioner on December 2, 1892, showing that it had been duly organized, as required by law, and was authorized to transact a banking business as provided by that act. Section 6 of that act was as follows: "Not less than ten per cent of the residue of the capital stock of such bank shall be paid in each month after such bank shall have been authorized to commence business as aforesaid."

It is claimed that under this provision the total balance unpaid on defendant's subscription became due on or before August 2, 1893. If this be true the action was barred.

At the time of the passage of the act of 1891 there was no banking law on the statute-book, except the savings bank act, under which plaintiff had organized, and a penal statute making

officers of banking institutions responsible for the reception of deposits or the creation of debts when the bank is insolvent, or in a failing condition. By the new law the legislature undertook to deal with the entire subject of banking in this state, evidently with the purpose of bringing order out of chaos then prevailing, to the benefit and protection of the people of the state. All matters relating to organization, conduct, management, and the winding up of affairs were provided for, and a special state office was created for the purpose of supervision, regulation, and control. The title of the act expressly named regulation as well as organization. Many of its provisions indubitably applied to ⁵³⁶ banks already in existence (some of them are conceded by counsel for defendant in error to be applicable to savings banks) and section 35 of the law itself provided as follows: "Any individual, firm or association who shall receive money on deposit, whether on time certificates or subject to check, shall be considered as doing a banking business, and shall be amenable to all the provisions of this act."

The constitutionality of this law as an exercise of the police power of the state has been declared by this court: *Blaker v. Hood*, 53 Kan. 499, 36 Pac. 1115.

Without entering upon an analysis of the two statutes, it is sufficient to say that the act of 1891 was intended to include a revision of the savings bank act, and to be a substitute for it. In framing the new law some of the provisions of the old were retained. These are to be construed as a continuation of such provisions—not of the chapters and sections, but of the provisions merely. But the savings bank act itself was superseded by the general law. From this it follows that section 128, article 16, chapter 23, of the General Statutes of 1868, was supplanted by sections 5 and 6 of the act of 1891, the latter of which is quoted above.

Power to make such a change in the law was granted to the legislature by the constitution, in section 1, article 12, which reads as follows: "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

A statute relating to the amount of capital stock, and the time, manner and condition of its payment, ⁵³⁷ clearly appertains to the subject of corporate creation, and is, therefore, subject to both amendment and repeal.

The new law having determined absolutely, within the limit of the contract, the time and amount of the payments to be

made by the stockholder upon the residue of his subscription, they became due at the prescribed periods: 2 Beach on Private Corporations, sec. 565, note 1; 1 Cook on Corporations, sec. 106. The statute of limitations commenced to run against their collection as soon as default occurred.

Defendant in error insists that the statute in question impairs the obligation of the contract of subscription, and, hence, that it cannot be applied. It appears, however, that by the statute the legislature merely asserted the power which, under the contract, had been left to the discretion of the board, and made absolute the liability which the board had the power to fix to the same extent the board might have done. Nothing was affected except the board's power to delay. The liability of the stockholder to pay was not changed or impaired or its boundaries of either time or amount disturbed. The board was the creature of the legislature, and subject to its direction and control. Any power the board might lawfully exercise the legislature could require to be exercised, or it could exercise the power itself. Therefore, the demurrer to the fourth defense should have been overruled.

The sixth defense presents matters which become material to the rights of the defendant only in the event of a holding adverse to him upon the demurrer to the fifth defense. Since the question so raised has been decided in his favor, the ruling of the district ⁵³⁸ court sustaining the demurrer to the sixth defense will not be disturbed.

The seventh defense is much confused in its allegations. It was undoubtedly subject to motion, and probably to a demurrer, on other grounds than the one proposed. The demurrer, however, was general, and enough appears in the answer to show that the debt exhibited in the petition as the foundation for the call was satisfied. The petition invited such an issue, and defendant was entitled to meet it. Therefore, the demurrer to the seventh defense should have been overruled.

The judgment of the district court is reversed, with direction to proceed further in accordance with this opinion.

All the justices concurring.

The Statute of Limitations in actions against officers and stockholders of corporations is the subject of a recent monographic note to *Boyd v. Mutual Fire Assn.*, 96 Am. St. Rep. 972-997.

SUMNER COUNTY v. CITY OF WELLINGTON.

[66 Kan. 590, 72 Pac. 216.]

TAXATION of Property Belonging to a City.—Waterworks Owned by a City and operated to supply public buildings and places and for protection against fire and for furnishing water to the public at fixed charges, and the rentals of which go into the public treasury and are expended for public benefit, are not subject to taxation. (p. 397.)

CONSTITUTIONAL LAW—Exemption from Taxation.—Where a constitution declares that the legislature shall provide for a uniform and equal rate of taxation, and that certain specified classes of property shall be exempt from taxation, this does not preclude the legislature from exempting other property. (p. 398.)

Emera E. Wilson, county attorney, and Ready & Ready, for the plaintiffs in error.

J. S. Dey and C. E. Elliott, for the defendant in error.

591 JOHNSTON, C. J. The officers of Sumner county undertook to levy and impose taxes on a waterworks plant owned by the city of Wellington. Originally the city granted to C. W. Hill and his assigns, upon certain conditions, the right to construct and maintain waterworks for the purpose of providing the city and its inhabitants with water. Under the franchise so granted the plant was constructed, and it was operated as a private enterprise for several years, when it was purchased by the city. Since that time the plant has been operated by the city, and, in addition to supplying water to the public buildings and places of the city, and also for fire protection, it furnishes to the people, at fixed charges, water for domestic purposes, and to private and public corporations for their needs, at prescribed rentals. The plant is located partly within, and partly without, the corporate boundaries of the city, and consists of both real and personal property of the value of about fifty thousand dollars. The questions in the case are raised upon the pleadings, and the turning-point is whether a waterworks plant owned and operated by a city is, under the constitution and laws, exempt from taxation.

Under the statute, a city of the second class, in which Wellington belongs, has full power "to purchase, procure, provide . . . waterworks . . . for the purpose of supplying such cities and the inhabitants thereof with water . . . for domestic use and any and all other purposes": Gen. Stats. 1901, sec. 1017. There was undoubted legislative authority for the city to municipalize

the plant. The supplying of water to the inhabitants, while not strictly a governmental function, so much affects the health ⁵⁹² and welfare of the people as to be closely akin to it. The plant was purchased with public funds; it is operated by the public officers and agents; and rentals derived from its operation go into the public treasury and are expended for the public benefit. The ownership and the purpose being public, there are good reasons why the property should be exempted from taxation. It is inconsistent with our theory of government to place a tax or burden upon one of the instrumentalities of government, and thus to impede its operation, and in some jurisdictions immunity from such taxation has been adjudged where there were no express constitutional or statutory exemptions: 12 Am. & Eng. Ency. of Law, 2d ed., 368. In our state the legislature has unequivocally declared that all property belonging exclusively to the United States, the state, and to any county, city, township, or school district, shall be exempted from taxation: Gen. Stats. 1901, sec. 7504. This statute only re-enforces and confirms the general principle that the instrumentalities of government shall be exempt from taxation, and it in effect declares that neither the state nor any of its subdivisions shall tax itself to raise money for itself. The statute makes public ownership of property the ground of immunity from taxation, and as the plant in question is absolutely owned by the city it is strictly within the terms of that exemption.

As against this view it is argued that the statute is in conflict with the following constitutional provision: "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation": Const., art. 11, sec. 1.

⁵⁹³ It will be noticed that the provision quoted does not require that all property in the state shall be taxed, but does provide that all which is subject to taxation shall be assessed and taxed at a uniform and equal rate. Certain exemptions are therein prescribed, which the legislature cannot ignore; but it does not forbid the exercise of the inherent power of the legislature to exempt property from taxation when in its judgment it may conduce to the public welfare. In *Francis v. Atchison etc. Ry. Co.*, 19 Kan. 303, 311, and in *Commissioners of Ottawa Co. v. Nelson*, 19 Kan. 234, 237, 27 Am. Rep. 101, it was in effect

said that the constitution does not in terms prohibit the exemption of property not therein enumerated, nor provide that no property shall be exempt, except such as is named in that section; and that it actually contains an implication that power exists to make exemptions beyond those expressly enumerated. Our constitution limits, rather than confers, power, and, hence, we look to it to see what it prohibits, instead of what it authorizes. Unless the sovereign power of taxation, which includes the power to make exemptions, is actually prohibited by the constitution it may be exercised by the legislature. In the absence of constitutional restrictions, the general rule is that the legislature has full power to grant exemptions from taxation, and, there being no such limitation, we cannot say that property like that in question, owned by a city, may not be exempted by the legislature.

If use, rather than ownership, were applied as the test to the right of exemption, the result would be the same. The fact that, in establishing and carrying on a system of waterworks, the city furnishes water to citizens and consumers for rental charges, does not make it a mere business enterprise, nor does it affect ^{the} exemption: *Town of West Hartford v. Board of Water Commrs.*, 44 Conn. 360. The earnings derived from the water furnished for domestic use and to consumers is, as we have seen, paid into the city treasury, and used in carrying on the city government, and thus inures to the benefit of the people of the municipality. We think that the trial court reached a correct conclusion, and its judgment will be affirmed.

All the justices concurring.

The Taxation of Public Property is discussed in *Edwards etc. Co. v. Jasper County*, 117 Iowa, 565, 94 Am. St. Rep. 301, 90 N. W. 1006; *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; monographic note to *Board of Commrs. v. Ottawa*, 33 Am. St. Rep. 400-413. On page 405 of this note will be found the decisions on the taxation of city waterworks.

IN RE KING.

[66 Kan. 695, 72 Pac. 263.]

HABEAS CORPUS—Custody of Children—Res Judicata.—Notwithstanding the determination in a previous proceeding by habeas corpus of the right to the custody of a child, another court may make a different order respecting such custody, if satisfied that the interests of such child so require, though no material change in the circumstances is shown. (p. 403.)

David Ritchie, for the petitioner.

Z. C. Milliken, for the respondents.

*** MASON, J. This is an original proceeding brought by Harriet King to obtain the custody of Harry J. Hines, aged six years, and Edith May Hines, aged four years. The parents of these children were married in 1895, the mother being then about seventeen years of age. They lived near Brookville, in Saline county, Kansas, until 1897, when they went to Kansas City, Kansas, where in February, 1900, the mother was granted a divorce from the father on the ground of nonsupport and abandonment. The decree made no reference to the children, who had been left with the father's mother, Harriet King, the petitioner in this case, in Saline county. In March, 1901, the mother was married to James E. Peck. In the following July she applied to the probate court of Saline county for a writ of habeas corpus by which she sought to have the custody of the children restored to her. Mrs. King, the respondent in that proceeding, resisted *** the order sought, and after hearing testimony, the court, on August 4th, remanded the children to her custody and awarded her their care and control until "changed in the manner prescribed by law." On August 15, 1901, Mrs. Peck made another attempt to procure the custody of the children by applying to the district court of Saline county for a writ of habeas corpus. Mrs. King, as the respondent, made return, setting up among other matters the proceedings in the probate court. This part of the return was demurred to, and the court overruled the demurrer and dismissed the cause. On the 21st of July, 1902, Mrs. Peck and her husband went to the home of Mrs. King, took the children, and removed them to their home. The present proceeding was begun August 5, 1902. Much testimony has been taken on behalf of each of the contending parties, the grandmother and the mother, to show that the other is unfit to be intrusted with the care of the children.

The petitioner claims that the orders of the probate and district courts form a bar to the present proceeding; that the whole matter here presented for litigation has been already determined by a court of competent jurisdiction, and is not subject to further judicial investigation. It has frequently been held that the doctrine of *res judicata* applies to the decisions of courts in habeas corpus cases, where the purpose of the writ is to obtain the custody of children: 15 Am. & Eng. Ency. of Law, 2d ed., 213. See, also, the case of *In re Hamilton*, 66 Kan. 754, 71 Pac. 817, and cases there cited. Granting the correctness of the legal proposition stated, it only applies so long as the situation of the parties is the same. In the present case there is testimony with regard to the treatment the children received at the hands of their grandmother after the ⁶⁹⁷ termination of the proceedings in the probate and district courts, which, if accepted as true, would justify this court in changing their custody, upon the theory that a new condition had arisen, materially different from that existing when the former adjudication was had. But there is also presented testimony to the contrary, and, as the testimony is all in writing, it would be difficult to reach a satisfying conclusion as to the actual facts in this regard, and we shall not attempt it, but shall decide the case upon other considerations.

A proceeding in habeas corpus relating to the custody of a child must be viewed in two aspects. In form, the writ purports to afford an inquiry into the question whether the child is unlawfully restrained of its liberty. In fact, it is ordinarily a means for investigating and determining which of two parties has the better right to the custody of a child. Some of the decisions, and perhaps all of them, in which it has been held that a ruling upon one application is an absolute bar to all inquiry upon a second application based upon the same state of facts, assume that the matter is to be treated merely as a private controversy between adverse claimants to the custody of the child. A typical case is that of *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, where it was said: "*In Re Snell*, 31 Minn. 110, 16 N. W. 692, this court held that a decision, under one writ of habeas corpus, refusing to discharge a prisoner, is not a bar to the issuing of another writ, based upon the same state of facts, nor to a hearing and discharge thereon. While there is room for a difference of opinion, and in fact a conflict of decisions, upon this question, yet, in view of the origin, history and purposes of this writ as a 'writ of liberty,' we adopted this rule in this class

of cases in which the liberty of the citizen is the question directly involved. But such cases are clearly distinguishable ⁶⁹⁸ we think, both upon principle and authority, from those in which the writ is sued out merely for the purpose of determining which of two parties is entitled to the custody of an infant child. In the latter the question is not really whether the infant is restrained of its liberty, but who is entitled to its custody. It is true that the charge is that the child is unlawfully restrained, etc.; but the gist of this charge is not that the child is unlawfully deprived of its liberty, but that such restraint is in prejudice of the right of relators to its custody. The case is really one of private parties contesting private rights, under the form of proceedings on habeas corpus."

We agree that, so far as such a proceeding is to be considered as a mere trial of conflicting private rights, there is no reason in the nature of things why the doctrine of estoppel by former adjudication should not apply. But we think that the proceeding is in a measure just what it purports to be—an investigation into a charge that a child is illegally restrained of his liberty; that is, that he is restrained by a custody that is illegal in the sense that it is not for the child's best interest. In such a view, the interest of the child being as sacred as the liberty of the citizen, the question of the effect of a former adjudication might be determined upon the same considerations as in an ordinary habeas corpus case. Although in *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, the court held to the accepted rule of estoppel, it used this language: "The distinction made between judgments remanding and those discharging the prisoner, grows out of the nature of the writ, whose *raison d'être* is the protection of personal liberty. It loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint."

⁶⁹⁹ Regardless of the analogy to the ordinary habeas corpus proceeding, however, we hold that the doctrine of estoppel does not preclude a court, in any case where it has acquired jurisdiction, from making such order with regard to the custody of a child as shall be for the child's best interest. The parents have, ordinarily, a legal right to the custody of their children. It is not an absolute and unqualified right, but it is a real right, with which a court may interfere only upon a showing of exceptional circumstances. When a court in a proper proceeding,

wherein conflicting claims to the right to the custody of a child are litigated, takes the custody from the parents and bestows it upon some other person, the legal right of the parent is to that extent extinguished and the new custodian has in that respect the same right formerly held by the parents. The parents may not dispute such right nor relitigate it, except upon a new state of facts. But the court has the same power to change the custody as against the new custodian as it had originally against the parents: *In re Bort*, 25 Kan. 308, 37 Am. Rep. 255.

It is true that in the cases where the doctrine of *res judicata* is applied in its widest scope, the welfare of the child is given great and even controlling effect, this consideration being treated as qualifying the legal rights of the claimants. Yet in other cases it is said that the custody of a child will be awarded as his own welfare may require, because the interest of the child will override the legal right and authorize an order in spite of such right: 15 Am. & Eng. Ency. of Law, 2d ed., 187, and cases there cited. Whether the welfare of the child is properly spoken of as modifying the legal right or as justifying an order in opposition to the right may not be important, but the distinction ⁷⁰⁰ between a question as to the comparative rights of two conflicting complainants and one as to what is for the best interest of a child is real and vital. The former may be controlled by a prior adjudication, but the latter is always open.

In the present case, then, we assume that the judgment of the probate court of Saline county determines the respective legal rights of the grandmother and the mother, and as against the mother places the right to the care of the children with the grandmother; and that the mother is estopped by such determination, and cannot relitigate the matter in this court unless upon a showing of a material change of conditions since that judgment was rendered. But nevertheless the responsibility is cast upon this court, which it cannot avoid if it would, of deciding what order herein is for the best interest of these children. In a matter of such importance to them, and of such inherent delicacy, it is to be regretted that more adequate means of information as to the exact facts are not afforded. This court cannot undertake to say just what portion of a mass of contradictory testimony is to be believed. From the spirit of bitterness that characterizes much of it, it is entirely probable that both charges and countercharges are untrue.

The decision of the probate court is entitled to weight, but as the evidence in that court is not before us, such decision must be

considered in the light of the depositions on file here, which seem to cover all phases of the controversy. We shall reach a determination upon a general view of the situation, rather than upon an attempted resolution in detail of the disputed issues of fact. The custody is asked by the grandmother, who is sixty-two years of age, and who is living alone. The children are now, and have been for over nine ⁷⁰¹ months, with their mother, who is living with her present husband, a man of good habits, against whom nothing is alleged, and who professes an interest in, and affection for, the children, as though they were his own. It is too clear for argument that in the case of children of such tender years, having regard alone to their own welfare, leaving all other matters out of consideration, their proper place is with their mother, unless it be found that she is unfit for the trust, or incapable of caring for them, and the evidence in this case does not warrant such a finding.

The children will be committed to the custody of Emma Peck, their mother. The costs of this proceeding, in view of all the circumstances of the case, will be taxed to respondents, James E. Peck and Emma Peck.

All the justices concurring.

Burch, J., not sitting, having been of counsel.

In *In re Hamilton*, 66 Kan. 754, 71 Pac. 817, the effect as res judicata of a decision in a proceeding in habeas corpus where the controversy arose over the custody of a child was again brought to the attention of the supreme court of the state. In this case, however, the issue was one between private parties contesting a question of private right, and there was no question of personal liberty, nor was the court of the opinion that the best interests of the child required any order to be made, conflicting with the determination made in the prior proceeding. The court was of opinion that in these circumstances "all matters in issue arising upon the same state of facts determined in the prior proceeding should be regarded as settled and concluded."

A *Decision on Habeas Corpus* respecting the custody of an infant is generally considered conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the status of the case: *In re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009; *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

MITTENTHAL v. MASCAGNI.

[183 Mass. 19, 66 N. E. 425.]

CONFLICT OF LAWS—Place of Contract.—The Construction and Legal Effect of a contract are governed by the *lex loci contractus*, unless there is something indicating a different intention of the parties. (p. 406.)

JURISDICTION, Limiting Place of by Contract.—A contract made in a foreign country between a citizen thereof on one part and persons on the other part who, by the terms of the contract, declare a special residence in the same country, which provided that the contract in its form and substance is regulated by the laws of that country, and that any differences which may arise between the parties will be acted upon by the civil courts of that country, except that actions for compensation for services to be rendered under the contract may be brought in the state of New York, has the effect of giving the courts of the foreign country exclusive jurisdiction of all matters arising under the contract other than such actions for compensation. (p. 406.)

JURISDICTION, Contract Limiting, When not Against Public Policy.—A stipulation in a contract executed in a foreign country by a citizen and resident thereof on the one part and persons who declare a special residence in the same country, reserving exclusive jurisdiction in its courts of all questions arising under such contract, if legal and binding where it is entered into, is not objectionable in this country on the ground of public policy, and our courts will not refuse to give it effect. (p. 407.)

LAWS, Foreign, Presumption of.—The law of a foreign country will be presumed to be the same as our own. (p. 407.)

JURISDICTION, Contract Limiting to the Courts of a Foreign Country.—A contract made in Italy between a musical composer, who is a citizen and resident thereof, on the one part, and a firm who declare a special residence in Florence on the other part, for a tour by the former through the United States, and which stipulates that all controversies arising under the contract shall be determined only

by the courts of Florence, is not so improvident or unreasonable that it will not be enforced in the courts of this country by their declining to exercise jurisdiction over actions brought therein contrary to the terms of such stipulation. (p. 408.)

Action for the alleged breach of a contract by the defendant. He pleaded that the contract between him and the plaintiffs restricted the jurisdiction of actions like this to the courts of Florence, Italy. In the contract, the plaintiffs declared a special residence in that city at a place therein designated, and the defendant also declared his place of residence in the same city. The contract stipulated for the payment to the defendant of seven thousand dollars ten days before his departure from Cherbourg, and that before the 17th of September, a like sum should be deposited in New York for him, with a representative of the Bank of Naples, of which deposit defendant should be advised before leaving Europe. The trial court ruled that the provision of the contract referred to in the opinion did not give the courts of Florence exclusive jurisdiction, and overruled a motion to dismiss, an answer in abatement, and a demurrer. The defendant appealed.

E. F. McClellan, for the defendant.

T. J. Barry, for the plaintiffs.

²¹ KNOWLTON, C. J. This case comes before us on a report from the superior court submitting the question whether there was an error of the presiding judge in overruling the motion to dismiss, the answer in abatement, and demurrer filed by the defendant, and in ruling that the fifteenth paragraph of the contract between the plaintiffs and defendant, upon certain facts agreed, was not a bar to the prosecution of the action in this commonwealth. The contract referred to was made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the state of New York, elected a domicile by a provision of the contract. By it the defendant undertook to direct certain concerts, and direct and present certain operas, all composed by him, in the course of a tour through such parts of the United States and Canada as the plaintiffs should designate, covering a period of fifteen weeks, for the sum of four thousand dollars per week, with sundry provisions for expenses and the like, and other stipulations prescribing the rights of the parties in various particulars which it is unnecessary to state. The contract was in the Italian language, and, according to the translated copy set forth

in the pleadings, it contains the following provisions: "The present contract, in its form and substance, is regulated by the Italian laws, by will of the parties concerned and according to article nine of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right of direct action in New York for the payment of his recompense; and, therefore, he alone has the faculty to derogate the competence of the established contract." The defendant moved to dismiss this suit and answered in abatement and demurred on the ground that, under this provision, our courts have no jurisdiction.

The construction and legal effect of a contract is governed by ²² the *lex loci contractus* unless there is something in it indicating a different intention of the parties: *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070; *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665; *In re Missouri Steamship Co.*, 42 Ch. D. 321; *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202. This contract was made in Italy, where one of the parties had his permanent home and the other a domicile elected by the terms of the contract. It was to be performed in part there, for the plaintiffs were to pay the defendant seven thousand dollars ten days before the time fixed for his departure from Cherbourg for the United States, but the further performance was to be in the United States. The intention of the parties that it should be governed by Italian laws was not left to inference, but was expressed in words.

The first and principal question is, What is the effect of the stipulation in regard to the adjustment of differences or questions between the parties? We have little doubt that it was meant to give exclusive jurisdiction of all such matters to the Italian courts, saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the courts of New York. This seems to be the meaning of the words of this translation, and another translation set out in the answer in abatement, whose correctness has not been disputed, tends to make this meaning even clearer. It is averred in the answer in abatement that such a provision is legal and binding under the laws of Italy. Of course, if this be true, it is immaterial what construction is put upon it under our laws. There is certainly nothing so objectionable in it, on grounds of public policy, that

our courts will refuse to give it effect under our treaty with Italy, which gives the citizens of each country full rights in the courts of the other: *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665. It is said in the report that the hearing was upon the pleadings "without objection that there was no reply to the answer in abatement." We are not quite certain whether, in the absence of a reply, the averments of this answer were taken to be true. If they are true, it is the duty of our courts to give the contract effect according to the law of Italy; but we infer, in the absence of proof in support of the averments of the answer, that the case was considered upon the declaration and ²³ admitted facts only. Assuming this, we must also assume that the law of Italy is like our own (*Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159, 22 N. E. 49), and we come to the question whether such an agreement of parties to a contract is valid here.

It is decided that an agreement in a contract that the parties shall not avail themselves of their right to an appeal to the courts for the settlement of their controversies, but shall submit them to private arbitration, will not be enforced because it is such an utter abnegation of one's legal rights as should not be permitted: *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115. On the other hand, it is allowable for parties to make such agreements in reference to preliminary and incidental matters of dispute, so long as they retain the right to appeal to the courts for the determination of any substantive question of liability: *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *Hutchinson v. Liverpool & London & Globe Ins. Co.*, 153 Mass. 143, 26 N. E. 439. Perhaps the tendency in modern times is to permit greater freedom in contracting in matters of this kind than formerly: *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *Daley v. People's Building etc. Assn.*, 178 Mass. 13, 59 N. E. 452. In most cases, certainly in a case like the present, there is no occasion for the protection of the dignity or convenience of the courts. The contract was between citizens of foreign states who, so far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of their disputes.

The determining question seems to be whether such a contract as this is so improvident and unreasonable, such an abnegation of legal rights, that the government, for the protection of mankind, will refuse to recognize it, even when made in a foreign

country by subjects or citizens of that country. We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the state may be arrested and held to bail or in imprisonment, if suits may be ²⁴ brought in any one of these numerous jurisdictions, there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent home in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compos mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand? The case is quite unlike *Nute v. Hamilton Ins. Co.*, 6 Gray, 174, although it has some features in common with that. In that case the provision was contained in a by-law of a mutual insurance company, and it undertook to limit claimants to one county in a small state for the venue of actions. The principles laid down in *Daley v. People's Building etc. Assn.*, 178 Mass. 13, 59 N. E. 452, are applicable, although the cases are different in some particulars. Similar doctrines are stated in *In re New York etc. R. R.*, 98 N. Y. 447, 452, and *Greve v. Aetna Live Stock Ins. Co.*, 81 Hun, 28, 30 N. Y. Supp. 668.

There is no attempt here to deprive either party of the right of appeal to the courts, as in *Rowe v. Williams*, 97 Mass. 163, but only an attempt to narrow the area within which suits may be brought. This is analogous to the limitation of the subjects of which the courts shall have exclusive jurisdiction, by a provision for the arbitration of incidental and subsidiary questions out of court, which is approved in cases above cited. It is also analogous to the limitation by contract of the time within which suits may be brought: *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 6 N. E. 742. We are of opinion that this part of the contract is valid.

The defendant has done nothing that deprives him of his right to rely on the contract. The suit which he brought prior to this was upon a later contract, and against parties not identical. Besides, in his declaration in that case, in stating inducements, he took pains to aver that there was no right to sue upon this contract in this country. The second suit, which he brought ²⁵ after he had been held to answer in this, contains a similar averment, and apparently he brought it to avail himself of such rights as he might have in case the decision in the present suit should be adverse to him. We are of opinion that the ruling was erroneous.

Motion granted.

Parties cannot by Contract take away the jurisdiction of courts to determine their rights and liabilities: Baltimore etc. R. R. Co. v. Stankark, 56 Ohio St. 224, 60 Am. St. Rep. 745, 46 N. E. 577; Myers v. Jenkins, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089. However, they may lawfully agree to impose a condition precedent with respect to matters which do not go to the root of the action. A stipulation in a policy of insurance that no suit shall be brought thereon unless in the county where the insurance company is established is not binding on the insured; neither is a stipulation whereby he waives the right to bring suit upon the policy except in the courts of the state incorporating the company; nor a stipulation whereby he waives the right to have the cause removed to a federal court: See the note to Utter v. Travelers' Ins. Co., 8 Am. St. Rep. 922.

JENNINGS v. VAHEY.

[183 Mass. 47, 66 N. E. 598.]

FIXTURES as Between a Mortgagee and a Vendor of Personal Property.—Ordinary Portable Kitchen Ranges placed in each set of rooms of an apartment house under a contract between the owner of the house and the vendor of the ranges, with a stipulation that the title should remain in the latter until they are paid for, do not prior to such payment become fixtures as between him and a mortgagee of the house, and hence the latter cannot enjoin their removal. (p. 411.)

Suit in equity to restrain the defendant from removing certain ranges from an apartment house on which the plaintiff held a mortgage. In the trial court the bill was dismissed. The plaintiff thereupon appealed.

D. Stoneman, for the plaintiff.

J. H. Vahey, C. H. Innes and J. B. Ferber, for the defendant.

⁴⁸ KNOWLTON, C. J. The plaintiff holds a title as mortgagee of an apartment house consisting of twenty-four apartments, in each of which is a kitchen range. The defendant made a contract with a predecessor in title of the plaintiff's mortgagor, to set up these ranges, with a stipulation that the title to them should remain in him until they were paid for. As they have not been paid for, the defendant claims a right to take them out under his contract, and the plaintiff has brought this bill to enjoin him, contending that the ranges are a part of the real estate which passed to the plaintiff under his mortgage. The judge at the trial found facts as follows: "1. I find that the ranges were not annexed to and did not become part of the realty; that they had no peculiar adaptation to the tenements in which they were placed; that they were no more essential to the enjoyment of the premises than any other ranges that could have been procured as furniture to replace them. 2. I do not find that the defendant or original lessee of the ranges, then being the owner of the buildings, intended that they should become a part of the realty either before or after they were paid for." He entered a decree dismissing the bill and the case is before us on the plaintiff's appeal.

The only question before us is whether the findings are so clearly erroneous as to call for a reversal of the decree: *Sheffield v. Parker*, 158 Mass. 330, 33 N. E. 501; *Wentworth v. S. A. Woods Machine Co.*, 163 Mass. 28, 39 N. E. 414; *Boston Music Hall Assn. v. Cory*, 129 Mass. 435.

The evidence shows that these are ordinary portable kitchen ranges, used principally for cooking, one being placed in the kitchen of each of the twenty-four apartments, resting upon a piece of zinc, which was also furnished by the defendant and laid upon the floor without being fastened to it, or to the range in any manner. From each of the ranges an ordinary funnel or stove-pipe passes into a hole in the chimney, constructed to receive such a pipe. Each range has a hot water front, which is not an essential part of the range, but can easily be removed from it without causing damage, as ranges of this kind are made with or without hot water fronts. Pipes from a hot water boiler are connected with the water front of each range by brass couplings and screws, which are attached to the boiler, and were ⁴⁹ connected by a plumber. The hot water boiler is not fastened to the building, but is placed upon a stand which rests on the floor without being attached to it. If the boiler should be removed it would leave no sign of its having been there, except a

hole in the ceiling of about the size of a gas-pipe, through which the water-pipe passes. The range could be removed without damage to the premises, and could be used in any other place where there is a hole in the chimney for a funnel. Such ranges can be bought at any stove store.

The case is almost identical with *Boston Furnace Co. v. Dimock*, 158 Mass. 552, 33 N. E. 647, in which it was held as a matter of law by a majority of the court that the ranges did not become a part of the building. There was evidence in that case, which, in the opinion of a minority of the court, presented a question of fact as to whether they belonged to the real estate. But the minority did not intimate that the question of fact should be decided in favor of the petitioner, who contended that they were a part of the realty. In the present case there is no ground for holding more favorably to the plaintiff than that there was a question of fact which it would be possible for a jury to find in his favor. But we are of opinion that the findings of the presiding judge were right. A decision to the same effect was made in *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; where portable furnaces set in the cellar of a house were held to be personal chattels: See, also, *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *McLaughlin v. Nash*, 14 Allen, 136, 92 Am. Dec. 741; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Maguire v. Park*, 140 Mass. 21, 1 N. E. 750; *Hubbell v. East Cambridge Five Cents Savings Bank*, 132 Mass. 447, 43 Am. Rep. 446.

The ranges seem to have been such as, in most parts of the state, tenants take with them from house to house when they change their residence, and set up as a part of their furniture, as they carry a bureau or a table. The fact that the owner of the building placed one in each of his twenty-four apartments gives a suggestion of permanence, which furnishes some ground for an argument in behalf of the plaintiff; but the contract which he made with the defendant shows that he did not intend immediately to make them his property as a part of the real estate. We certainly cannot say that the decision of the judge of the superior court was plainly wrong.

Decree affirmed.

What are Fixtures is the subject of a monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696. See, too, the recent case of *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314, and cases cited in the cross-reference note thereto. It has been held that a portable hot-air furnace, connected with the house in the usual

manner, is not a part of the realty: *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. But the contrary has been held as to steam radiators: *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257. As to whether a baker's oven is a fixture, see *Baker v. McClurg*, 198 Ill. 28, 92 Am. St. Rep. 261, 64 N. E. 701; *Collamore v. Gillis*, 149 Mass. 578, 14 Am. St. Rep. 460, 22 N. E. 46.

F. W. DODGE COMPANY v. CONSTRUCTION INFORMATION COMPANY.

[183 Mass. 62, 66 N. E. 204.]

PROPERTY in Compiled Information and Reports.—One who collects information in regard to the contemplated erection of public and private buildings and the construction of sewers, waterworks, and other undertakings of public utility as soon after their contemplation as possible, and compiles and distributes such information daily to his customers under contracts with them, so that it is of commercial value by reason of the speedy use which can be made of it before the information contained therein has obtained general publicity, has a property interest in such information in which he is entitled to the protection of a court of equity. (p. 414.)

REPORTS AND INFORMATION—Publication of, What is not. The furnishing of reports and information to customers under a contract with them that they shall hold the information in strict confidence and for their purposes only, is not a publication thereof, so as to dedicate the reports or information to the public, and deprive their compiler and furnisher of his right of control. (p. 415.)

REPORTS AND INFORMATION—Enjoining the Surreptitious Obtaining and Using of.—Where information is obtained and compiled by the expenditure of labor and money, and, in the form of reports, is distributed to customers for a compensation, under a contract by which they agree not to divulge such reports or information, a third person may be enjoined from obtaining such reports or information from one of such customers, contrary to such stipulation, and using it for the purpose of conducting a rival business. (p. 415.)

Suit in equity to restrain the Construction and Information Company from obtaining from plaintiff's subscribers information procured and compiled by it and confidentially imparted to them under contracts binding them not to divulge it, and to restrain the other defendants from paying to the Construction company any sums of money for information thus wrongfully obtained. In the trial court the case was heard upon general and special demurrers of the Construction company, which were overruled, and the judge, being of the opinion that the decree overruling the general demurrer so affected the merits of the controversy that the matter ought to be determined by the supreme court, reported the case to it for further determination.

J. R. Dunbar and W. Odlin, for the plaintiff.

C. F. Choate, Jr., and E. C. Stone, for the first named defendant.

KNOWLTON, C. J. This case comes before us on demurrers to the plaintiff's bill. The plaintiff corporation has been engaged ⁶³ for some years in the business of collecting information in regard to the erection of buildings both public and private, the construction of sewers, waterworks, and other undertakings of public utility, as soon after they are contemplated as possible. This information is carefully compiled and distributed each day to the plaintiff's customers in accordance with their contracts, enabling them very early to take such steps as may seem to them best to obtain contracts to do the work or to furnish supplies. The plaintiff, at great expense, has many servants and agents employed in the collection, preparation and distribution of this information, which it sells to its subscribers under a contract in writing whereby the subscriber binds himself to use the reports in strict confidence and for his business only. The formal contract with subscribers, annexed to the bill, which is in blank, with large spaces for writing in special arrangements, shows that the information may be printed, written or oral, and implies that the information furnished to the subscribers is such as pertains to their different kinds of business, so that different subscribers receive information in detail on different subjects, according to their interests. It also contains an agreement to be signed by each subscriber, to hold the information in strict confidence and for his business only.

The plaintiff avers that the defendant corporation is engaged in the same kind of business as the plaintiff, and that it has obtained unlawfully and dishonestly, from the plaintiff's subscribers, information furnished them by the plaintiff under these contracts, being aware of the terms of the contracts between the plaintiff and its subscribers, and that it is purchasing these reports from these subscribers for cash, and is furnishing them to its subscribers daily, and is informing the plaintiff's subscribers that by subscribing for the reports of the defendant they will obtain the advantages of the plaintiff's reports for a less price than the plaintiff charges for them. The plaintiff says that the defendant has thereby prevailed upon many of the plaintiff's subscribers to cease buying the plaintiff's reports, and has caused the plaintiff great loss and damage. The prayer of the bill is for an injunction and an account.

The important question in this case may be divided into two parts: 1. Has the plaintiff any property in the information after ⁶⁴ it has been obtained at great expense and compiled for the use of its subscribers? 2. Does it lose its property by publication, abandonment, or dedication to the public, when it furnishes the information to subscribers under these contracts? The facts, before it has ascertained them, unless they are held for a special purpose, confidentially and as secrets, are not property; but when these facts have been discovered promptly by effort and at expense, and have been compiled and put in form, and are of commercial value by reason of the speedy use that can be made of them before they have obtained general publicity, they are property. They represent expensive effort and valuable service, and, in the form in which they are presented to subscribers, they may be used with a reasonable expectation of profit from the early possession of them. The information is not visible, tangible property, but there is a valuable right of property in it which the courts ought to protect, in every reasonable way, against those seeking to obtain it from the owner without right, to his damage. What the plaintiff has when the defendant seeks to obtain it from him is the possession of valuable information. This early possession is valuable in itself. The plaintiff has it and the defendant does not have it. If the defendant can obtain it legitimately he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant, surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession and shares it, this conduct is a violation of the plaintiff's right of property. That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kinds of news obtained to be furnished to those who will pay for it: *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147; *Exchange Tel. Co. v. Central News*, [1897] 2 Ch. 48. This has also been held by different courts in this country: *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194; *Chicago Board of Trade v. Christie Grain etc. Co.*, 116 Fed. 944; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. ⁶⁵ 294. We are of opinion that one's possession of information which he has obtained, compiled, and put in

form for a specific use, is a right which ought to be protected against those who would share it with him without his consent.

The next question is whether the giving of information by the plaintiff to its subscribers is a publication of it, such as dedicates it to the public and deprives the plaintiff of its right of control. It is well established that the private circulation of information or literary composition, in writing or in print, for a restricted purpose, is not a publication which gives the public a right to use it: *Prince Albert v. Strange*, 1 Macn. & G. 25; *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867; *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147; *Exchange Tel. Co. v. Central News*, [1897] 2 Ch. 48; *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1076. See, also, *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *The Mikado Case*, 25 Fed. 183, 23 Blatchf. 347; *Press Pub. Co. v. Monroe*, 73 Fed. 196.

It has been held in *Ladd v. Oxnard*, 75 Fed. 703, 729, and in *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. 872, that where a company published a reference book, or a book of mercantile agency credit ratings to an unlimited number of subscribers, under a stipulation that the book was furnished as a loan and not as a sale, and that it should not go into other hands, there was a publication. Each of these suits was brought under the United States copyright act, for an infringement of the copyright, and the decision was on the ground that by reason of publication the copyright was not perfected. In the latter case three of the judges did not agree that there was a publication. The thing sent out in these cases was a book designed to be preserved and used for a considerable time. It was in a convenient form for transfer from hand to hand, and for use from time to time by different persons. We do not think that these cases very much resemble the case before us. The information given by the plaintiff in this case, as we infer, is of specific facts for particular persons or classes of persons, adapted to their interests, and furnished from time to time as the facts are ascertained. It seems very unlike the sale or loan of a large printed book, designed to be distributed among a large class of persons. We think the case falls within the principles⁶⁶ laid down in the cases first above cited. It makes no difference that the information in some of these cases was furnished by telegraph, and that in this it is furnished orally, or in writing or in print. We are of opinion that the averments of the bill do not show a publication which deprives the plaintiff of its rights of property.

We have considered the case without reference to the question whether it would be possible to obtain a copyright upon the plaintiff's compilations, for we think its rights are the same, however this question might be decided. It would seem, however, to be impracticable to obtain copyrights in the course of the plaintiff's business, whether the material would be a subject for a copyright under the statute or not.

We do not deem it necessary to consider at length the objections raised by the special demurrer. Although the averments of the bill are not so full as might be desired, we are of opinion that they are sufficient.

Demurrers overruled.

An Author has, independently of any question of copyright, an exclusive property in his composition until, by publication, it becomes the property of the public: *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; note to *Hoyt v. Mackenzie*, 49 Am. Dec. 181. One writing a book may keep the manuscript without printing it, or may print it and determine that the public may not see it, or may give it private circulation for a restricted purpose without losing his common-law rights therein: *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. 872.

FANEUIL HALL NATIONAL BANK v. MELOON.

[183 Mass. 66, 66 N. E. 410.]

NEGOTIABLE INSTRUMENTS—Release of Maker Without Affecting the Indorsers.—An agreement not to sue the maker of a negotiable instrument may reserve all rights against the indorsers. (p. 417.)

PARTNERSHIP—Release of the Firm Without Affecting the Liability of Its Members as Indorsers.—Where a negotiable note is executed by a partnership and indorsed by its members and others, an agreement not to sue the maker, but reserving all rights against the indorsers releases the firm as maker, but not the individual members as indorsers. (p. 417.)

S. R. Cutler and H. W. James, for the defendants.

A. L. Millan, for the plaintiff.

66 MORTON, J. This is an action against the defendants as indorsers upon a promissory note to recover the balance due upon it. The case was heard upon agreed facts, and judgment was ordered for the plaintiff. The defendants appealed.

The note was signed by the firm of Meloon and Wyeth and was dated October 22, 1900, and was payable three months after date to the plaintiff's order. The plaintiff discounted it, and ⁶⁷ delivered the proceeds to the firm. The firm consisted of Mary C. Meloon and William H. Wyeth, and they with one Hopkins H. Meloon severally indorsed the note before it was delivered to the plaintiff. The firm also indorsed it. On January 18, 1901, before the note came due, the firm notified the plaintiff that they were unable to pay it, and thereupon, on that date, the plaintiff executed and delivered to the firm, with the knowledge of all of the defendants, an agreement agreeing that in consideration of the payment by the firm of seventy-five per cent of the amount due on the note and the acceptance by other creditors of the firm of the same per cent of their respective claims, it would never commence or prosecute any legal proceedings against the firm to collect the note, but expressly reserving "all its rights to proceed against Mary C. Meloon, H. H. Meloon and W. H. Wyeth, the indorsers upon said notes, individually to collect the balance due upon said notes." The firm subsequently paid the plaintiff and its other creditors the percentage agreed upon. Demand has been duly made for the payment of the balance and the note has been duly protested. The defendants Wyeth and Mary C. Meloon contend that the effect of what has been done is to discharge them from liability. We do not think that is so. There can be no doubt that the holder and owner of a negotiable promissory note may covenant with the maker not to sue, as was done in this case, and reserve all his rights against the indorsers: *Taunton Nat. Bank v. Stetson*, 145 Mass. 366, 14 N. E. 349; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132; *Tobey v. Ellis*, 114 Mass. 120.

It may be observed, though of course it has nothing to do with the decision, that it is now expressly provided by the Revised Laws which went into effect since this action was brought that "The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity": *Rev. Laws, c. 73, sec. 139*. In this case the covenant not to sue was with the firm as a firm, and not with the indorsers. All rights against the indorsers as such were expressly reserved. The defendants Wyeth and Mary C. Meloon were none the less indorsers and none the less liable as such because they were also liable as members of the firm which made the note. The effect of the covenant not to sue was to release the firm as the maker, not ⁶⁸ the individual members as indorsers. It is true

that each partner is liable in solido for the debts of the firm; but his separate estate is liable in the first instance for his individual debts, and his individual indorsement of a firm note may therefore enhance the security afforded by it. For this reason the holder of a firm note indorsed by the individual members of the firm might be willing to compound his claim against the firm, if he could reserve his rights against the indorsers, and we see no objection to his doing so: See *Roger Williams Nat. Bank v. Hall*, 160 Mass. 171, 35 N. E. 663.

Judgment affirmed.

A Release of the Maker of a promissory note without the consent of the indorser, operates to release the indorser: Union Nat. Bank v. Grant, 48 La. Ann. 18, 18 South. 705; *Eldredge v. Chacon, Crabbe*, 296, Fed. Cas. No. 4329. See, too, *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Smith v. Rice*, 27 Mo. 505, 72 Am. Dec. 281; *Priest v. Watson*, 75 Mo. 310, 42 Am. Rep. 409. But it is held otherwise if the instrument by which the maker is released expressly reserves the remedy of the holder of the note against the indorser: *Tobey v. Ellis*, 114 Mass. 120. And a covenant not to sue the maker, reserving all rights against the other parties, has been held not to release the indorsers: *Kenworthy v. Sawyer*, 125 Mass. 28.

YOUNG v. INHABITANTS OF FALMOUTH.

[183 Mass. 80, 66 N. E. 419.]

MECHANICS' LIENS.—A Public Library Building, erected by a town for a free public library, is not subject to a mechanic's lien. (p. 419.)

S. R. Cutler and J. W. James, for the petitioner.

J. F. Neal and H. P. Harriman, for the respondent.

80 MORTON, J. This is a petition to enforce a mechanic's lien for labor performed in the erection of a building by the respondent town for a free public library. The case was sent to an auditor, and at the trial in the superior court the only evidence before the jury was the auditor's report. The petitioner requested the judge to rule that the building and land were subject to a mechanic's lien in his favor, and that he was entitled to recover. The judge refused so to rule and ruled that the building was not subject to a mechanic's lien, and directed the jury to return a verdict for the respondent. The

case is here on exceptions by the petitioner to the judge's ruling and to his refusal to rule as requested.

The sole question is whether the building is subject to a mechanic's lien. We do not think that it is. It has been decided that a schoolhouse held by a municipal corporation for public school purposes is not subject to a mechanic's lien, and the decision is said to be in accord with the almost unanimous current of decisions elsewhere: *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Staples v. Somerville*, 176 Mass. 237, 242, 57 N. E. 380. The ground of decision in such cases is that the buildings are held for a public use, and it is against public policy, in the absence of express provisions to the contrary, that the instrumentalities for ⁸¹ carrying on the government should be the subject of seizure and sale for debt. It is true that cities and towns are not required to maintain public libraries as they are schools and highways for instance. But it is plain, we think, that money appropriated for the erection and maintenance of a free public library is appropriated for a public use: *Rev. Laws*, c. 25, sec. 15; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998. Whether a use is public does not depend on whether it is compulsory, but on its nature and purpose: *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289. Towns and cities derive no gain or profit from the establishment and maintenance of free public libraries any more than they do from that of free public schools. They are established solely for the general and common good, and we cannot doubt that they come within the same principle as instrumentalities of government that free public schools do.

Judgment for the respondent on the verdict.

The Mechanic's Lien Laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public use: *Pittsburg Testing Laboratory v. Milwaukee Electric etc. Co.*, 110 Wis. 633, 86 N. W. 592, 84 Am. St. Rep. 948, and cases cited in the cross-reference thereto; monographic note to *La Crosse etc. R. R. Co., v. Vanderpool*, 78 Am. Dec. 696.

MINNS v. BILLINGS.

[183 Mass. 126, 66 N. E. 593.]

CHARITIES, Public.—Funds for the Relief of Certain Societies.—Bequests to the trustees of the permanent fund of the Franklin Typographical Society and to a like fund for the sick and disabled members of the Teachers' Mutual Benefit Association, and also for the benefit of sick and disabled members of the Bank Officers' Association of the city of Boston are all bequests for public charities. (p. 422.)

CHARITIES, Public.—Bequests for the benefit of the Massachusetts Society for the Prevention of Cruelty to Animals, and for the benefit of the Animals' Rescue League of Boston are bequests for public charities. (p. 423.)

CHARITIES, Public.—A Bequest to the Proprietors of the Boston Athenaeum, a corporation established for the purpose of maintaining a valuable and extensive collection of such rare and valuable works, in ancient and foreign languages, as are not usually to be met with in our country, but which are deemed indispensable to those who would perfect themselves in the sciences, and for the purpose of forming a museum of natural and artificial curiosities and productions, scientifically arranged, is a bequest to a public charity. (p. 425.)

Suit in equity brought by the surviving executors of Robert C. Billings for instructions. The clause of the will under which the executors acted and in respect to which they asked for instructions was as follows:

"Whereas by said will I provided that 'any sums still remaining shall be disposed of by my executors, they using their best judgment and taste in doing so' now in order that said charitable trust may not fail for want of definiteness or any other cause I give all the rest, residue and remainder of my estate to my said executors and the survivors or survivor of them and to his successor in trust nevertheless to apply the whole or any part of the principal and income, in their discretion, to such charitable purposes as to them, or the survivors or survivor of them or any administrator with the will annexed shall seem proper and for the purpose I give to them the widest discretion and request that no surety shall be required on any bond from them, or either of them—and that they may take all the time they please in disposing of said residue. My executors and trustees may in their discretion continue any investment made by me—and shall be responsible only for their willful defaults."

By agreement of the parties, the bill and answers were reserved for determination by the full court.

Roland Gray, for the Boston Athenaeum.

H. G. Denny, for the Boston Library Society.

L. Cushing and H. D. McLellan, for the Animal Rescue League.

S. C. Darling, for the trustees of the Permanent Charity Fund of the Bank Officers' Association of the City of Boston.

C. T. Gallagher, for the Franklin Typographical Society.

F. H. Nash, assistant attorney general, for the commonwealth.

¹²⁷ KNOWLTON, C. J. The plaintiffs, surviving executors of the will of Robert C. Billings, late of Boston, deceased, have received, under the will and the seventh codicil, all the rest, residue and remainder of his estate after paying legacies, in trust to apply the whole or any part of the principal and income "to such charitable purposes" as to them may seem proper. They propose to apply various sums from the fund in their hands to one hundred and twenty-six different objects and purposes which are set out in this bill, and they ask the instructions of the court as to whether some of these objects and purposes are "charitable purposes" within the meaning of the will and codicil. They state their intention in most cases to make the gifts to the institutions mentioned as a permanent fund in each case, the income only to be used for the general purposes of the institution. The next of kin and the attorney general have filed answers, and the attorney general has filed a brief. Some of the proposed beneficiaries have asked and been permitted to file briefs as amici curiæ.

Only a few of the proposed gifts have been called in question by the attorney general. The next of kin in his answer merely joins in the prayer of the bill. The other proposed gifts have ¹²⁸ not received so extended an examination by the court as would have been thought necessary if objection or question had been made in regard to them by any party interested. We shall not discuss them any further than to say that, upon the statements contained in the bill, we see nothing to show that they may not all be treated as gifts to public charities under the liberal doctrines established by recent decisions of this court. We shall, therefore, assume that the particular facts in each case, taken in connection with the general facts

stated in the bill, are such as to warrant the executors in making these institutions beneficiaries. The first class of beneficiaries referred to in the brief of the attorney general comprises three incorporated mutual benefit associations, and the question was raised whether money given to these associations would be held for a charitable use. The decisions in *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966, *Newcomb v. Boston Protective Department*, 151 Mass. 215, 24 N. E. 39; *Young Men's Protestant Temperance etc. Soc. v. Fall River*, 160 Mass. 409, 36 N. E. 57 (see, also, *In re Clark's Trust*, 1 Ch. Div. 497; *Burke v. Roper*, 79 Ala. 138), mark the distinction between public charities and mutual benefit associations supported by contributions or assessments from their members, whereby the members become entitled to certain benefits in case of sickness or accident, as a personal right. But the application of the principles stated in these cases is not required in considering these proposed gifts, because of amendments to the bill made since the brief was filed. Number 78 of the proposed beneficiaries mentioned in the bill as amended is, "The trustees of the permanent fund of the Franklin Typographical Society, Boston, Massachusetts. Trustees of a permanent fund which is derived solely from gifts and bequests, and is provided for the purpose of paying a death benefit and giving charitable assistance to sick, disabled, or dependent members of the Franklin Typographical Society, Boston, Massachusetts, an incorporated mutual benefit association, their widows and orphans, and otherwise assisting needy persons in any way connected with the printing business, said fund being entirely within the control of its trustees, and solely applicable to such purposes." Number 76 is as follows: "The trustees of a permanent fund to be established for the purpose of giving charitable assistance to sick or disabled ¹²⁰ members of the Boston Teachers' Mutual Benefit Association, Boston, Massachusetts, an incorporated mutual benefit association; said fund to be entirely within the control of its trustees, and solely applicable to such purposes." Number 77 is in similar terms, as follows: "The trustees of the permanent fund of the Bank Officers' Association of the city of Boston. Trustees of a permanent fund which is derived solely from gifts, bequests, honorary membership fees, and proceeds of entertainments, and is provided for the purpose of giving charitable assistance to sick or disabled members of the Bank Officers' Association of the city of Boston, an incorporated mutual benefit association, said fund be-

ing entirely within the control of its trustees and solely applicable to such purposes." In each of these cases the proposed transfer is to trustees of a fund created and maintained by gifts, bequests and gratuities, to be entirely within the control of the trustees, for the purpose of rendering charitable assistance to sick and disabled persons who are members of these associations, respectively, and to be used for no other purpose. Each of these funds so held and used has all the qualities of a public charity, unless the fact that in two of the organizations its benefits are limited to members of the association makes it a private instead of a public charity. But the trustees hold the legal title and control the fund. Its benefits are for all the members of a class. The class, in reference to the individuals who will belong to it as the years go by, is indefinite. The charity is bestowed upon all needy persons who at any time are included in the class. It appears that the class in one case is open to all teachers in the public schools, in another to all printers, and in the third to all bank officers and bank clerks, in the city of Boston, who wish to be included in it. The class in each case is a large one. The relief of the necessities of all the members of one of these classes is an object so general and indefinite as to be deemed of common and public benefit, and so a public charity. That the money used comes from the bounty of the generous and is controlled by trustees acting as their representatives fulfills one of the usual requirements of a public charity. We are of opinion that these gifts come within the authority conferred upon the executors by the will and codicil: *Saltonstall v. Sanders*, 11 Allen, 446, 455; *Washburn v. Sewall*, 9 Met. 280; ¹⁸⁰ *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; *Pease v. Pattinson*, 32 Ch. Div. 154.

The next class referred to in the attorney general's brief includes two corporations, "The Massachusetts Society for the Prevention of Cruelty to Animals" and "The Animal Rescue League of Boston." The objects of these institutions are indicated by their corporate names, respectively, and are stated more at length in the bill. In *Bartlett, Petitioner*, 163 Mass. 509, 40 N. W. 899, it was assumed, without discussion, that the first of these two corporations was a public charity, and the decisions in England in reference to objects like those of these two corporations are to the same effect: *Obert v. Barrow*, 35 Ch. Div. 472; *Mitford v. Reynolds*, 1 Phill. 185; *University of London v. Yarrow*, 1 De Gex & J. 72; *Tatham v. Drummond*,

34 L. J. Ch., N. S., 1; In re Douglas, 35 Ch. Div. 472. We are of opinion that the proposed gifts to these corporations are legal and proper.

Number 109 of the proposed beneficiaries is, "The proprietors of the Boston Athenaeum, Boston, Massachusetts," a corporation established by the Statutes of 1806, chapter 42, for the expressed purpose of maintaining a "valuable and extensive collection of such rare and valuable works, in ancient and modern languages, as are not usually to be met with in our country, but which are deemed indispensable to those who would perfect themselves in the sciences"; and for the purpose of forming "a museum of natural and artificial curiosities and productions, scientifically arranged; also, an apparatus for the performance of experiments in the various branches of natural philosophy, and for geographical improvements, as well as a repository for models of new and useful machines, and of statues, paintings, and other objects of the fine arts, more especially of our native artists; for which important objects no adequate provision has hitherto been made or formed within this commonwealth, although similar establishments have long since partially existed in many of our sister states." The statements of the amended bill give us additional facts in regard to the management of the institution in detail.

The objects of the corporation are in a broad and liberal sense and in a high degree educational. The only question raised is whether this is a private institution, conducted for the benefit ¹⁸¹ of its members, or whether its objects are general and public, such that either the whole public, or a class or classes indefinite as to numbers representing the public, share in its benefits. The preamble of the statute, from which we have quoted above, indicates that the legislature treated it as a matter of public importance and not as a private enterprise. The commissioners who compiled the laws of the commonwealth in conformity with a resolution passed February 22, 1822, of whom Lemuel Shaw was one, published it among the general and public laws and not among the special laws. Section 5 of the act provides that the governor, the lieutenant-governor, the members of the council, of the Senate, and of the House of Representatives for the time being, shall have free access to the library, museum, and repository of the fine arts of the corporation. It also gives the commonwealth, through the legislature, by a committee or committees, visitatorial power to examine the affairs of the corporation. The

public officers referred to represent a considerable class of the public. The visitatorial power in itself shows that, by the statute, the corporation is treated as a public charity. It appears by the bill that there are one thousand and forty-nine shares of stock, each one of which entitles its owner, and the members of his household, and two other persons designated by him, to all the privileges of the library. He also may introduce any number of strangers not residing within twenty miles of Boston, who are entitled to use the library for thirty days. These shares are freely transferred without the assent of any person but the owners, are quoted in the regular stock market lists, and anyone wishing to obtain a share can always obtain one within one or two weeks. The corporation maintains an extensive library, containing many rare and valuable books not to be found elsewhere in the neighborhood of Boston. The corporation owns many valuable works of art which formerly were regularly exhibited to the public at the Athenaeum building, and the most important of which are now kept on exhibition at the museum of fine arts in Boston, where they are frequently exhibited to the public, free of charge.

The corporation receives from the government of the commonwealth, and from the government of the United States, the regular official governmental publications. It treats these publications ¹³² as open to the inspection of any citizens, as a matter of right. The institution is conducted with great liberality with reference to allowing the use of the library to inquirers and students without payment, and in lending books to such persons, and in assisting them. It also conducts a system of inter-library book lending, by which books are lent to various colleges, and books in turn are borrowed from them. From one-half to one-third of the time of the employés of the library who are occupied in assisting and furnishing information to readers is taken up by persons who are not proprietors, or authorized by proprietors to use the library on their shares.

Many funds have been bequeathed by will or donated to the corporation from time to time, some of them of large amounts.

Upon these facts we are of opinion that the Boston Athenaeum, in its organization and its management, is not for the private benefit of its individual members alone, but in large part is for the public. Most of its advantages may be enjoyed by any person whose taste and education enable him to find pleasure and profit in the use of them. It is an important educational institution in a field of its own, established and

fostered by the commonwealth for the public good. That the shareholders, by their investment, contribute to the cost of its maintenance, and have greater opportunities than others for the enjoyment of its privileges, does not deprive it of the characteristics of a public charity, which pertain to it in its broader and more general relations. We are of opinion that a gift may be made to this institution, as proposed by the trustees: See *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371.

The next proposed beneficiary is, "The Boston Library Society, an institution similar in its scope and purpose to the Boston Athenaeum." Upon this statement, which is all that is before us in regard to this corporation, that which we have said about the Boston Athenaeum applies to the Boston Library Society also.

The plaintiffs are instructed that all of the proposed gifts appear to be within the authority conferred upon them by the will and codicil.

So ordered.

Charitable Uses and trusts are discussed in the monographic note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 248-269. See page 267 of this note for cases holding that the prevention of cruelty to animals is a valid charity. For recent cases on charities, see *Estate of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. 707; *Clayton v. Hallett*, 50 Colo. 231, ante, p. 117, 70 Pac. 429.

BOSTON STEEL AND IRON COMPANY v. STEUER.

[183 Mass. 140, 66 N. E. 646.]

APPELLATE PRACTICE—Grounds of Objection.—Where it appears that a wife offered in evidence her instructions to her husband, not made in the presence of the plaintiff or anyone representing it, as to the use of a check intrusted to her husband by her and that the court declined to admit the evidence, and she excepted, it cannot be held that it does not appear but the instructions were given in a private conversation between the husband and wife, and were inadmissible on that ground. (p. 429.)

BANKING—Check—Bona Fide Purchaser of, Who is.—If a check payable to a creditor of a husband, and signed by a wife, is handed by her to her husband, to be delivered to the creditor in payment of a debt due from her to him, but is fraudulently handed by the husband to the creditor in payment of a debt due to him from the husband and is so accepted in good faith, such creditor is a bona fide purchaser of a check, and she cannot set up her husband's fraud in defense of the check, nor maintain an action for money had and received after the payment of it, on discovering the fraud. (p. 430.)

BANKING—Check—Payee of may be a Bona Fide Purchaser of.—One named as a payee in a negotiable check may become a bona fide purchaser of it, with all the rights incident to a purchaser for value without notice. (p. 480.)

NEGOTIABLE INSTRUMENTS—Purchaser for Value, Who is. The Payment of a Pre-existing Debt makes the holder a bona fide purchaser for value. (p. 430.)

NEGOTIABLE INSTRUMENTS—Check—Holder in Due Course, Who is.—One named as a payee in a check drawn by a married woman and delivered by her to her husband to deliver to such payee in payment of her debt is a holder thereof in due course, though it is delivered to him by the husband in payment of the latter's own debt, where it was received without notice of the misappropriation by the husband. (p. 430.)

NEGOTIABLE INSTRUMENTS—Holder in Due Course.—A pledgee of a check may be a holder in due course, under section 9 of the negotiable instruments act of 1898. (p. 430.)

NEGOTIABLE INSTRUMENTS—Check Blank as to Amount. A check or bill of exchange in which a blank is left as to amount is an incomplete instrument, and the rights of a purchaser depend upon the real authority which the signer has in fact given in the matter, under the negotiable instruments act, and if delivered in payment of a debt to one person, when the instructions of the signer were to deliver it in payment of the debt of another, the application of the check to the payment of the debt of the former cannot be sustained. (p. 432.)

EVIDENCE of Instructions Given in the Absence of the Person to be Affected.—Where a check, blank as to amount, is given by a wife to her husband, with instructions that he deliver it to the payee in payment of her debt, and it is in fact filled up as to amount and delivered in payment of the husband's debt, evidence of these instructions is admissible against the payee, though not made in his presence, nor brought home to his knowledge before receiving the check. (p. 433.)

Action of contract for work and materials furnished for the defendant's building at 811 Beacon street, Boston. At the trial the judge excluded certain evidence offered by the defendant, and refused to make certain rulings requested by her, and found in favor of the plaintiffs, and she alleged exceptions.

E. Greenhood, for the defendant.

J. K. Berry, for the plaintiff.

141 LORING, J. The only question in issue between the parties in this case is the right of the defendant to be credited with two sums of two hundred dollars and four hundred dollars, respectively, under the following circumstances.

On December 31, 1898, the defendant's husband owed the plaintiff seventeen hundred and eighty-one dollars and thirty cents, for iron work furnished by it to him in the construc-

tion of a house No. 819 Beacon street. On being pressed for payment, the defendant's husband, on January 21, 1899, delivered to the plaintiff the defendant's check for two hundred dollars, payable to the plaintiff. It is stated in the bill of exceptions that on February 2, 1899, "he paid the plaintiff the further sum of four hundred dollars in a check made by said Jennie D. Steuer." But it appears from the auditor's report, which was before the court and is referred to in the bill of exceptions, that the plaintiff's manager's name was Newcomb, and that his story was that the check for four hundred dollars "was brought to him at his office on Devonshire street by Mr. Steuer in response to further demands for money, and that it was made out in blank and filled up by himself, Mr. Steuer being unwilling that it should be made for more than two hundred dollars, while Mr. Newcomb insisted that it should be for the larger amount and so made it, with Mr. Steuer's consent, and applied it to his debt." The defendant's story was "that she gave the check to Mr. Newcomb at her house."

In addition to the iron furnished the defendant's husband for 819 Beacon street, the defendant's husband had ordered two iron columns and a base plate from the plaintiff for another house, No. 811 Beacon street, which the plaintiff supposed was Steuer's until his manager was told on March 10th that it belonged to the defendant's wife. These two columns and base plate were delivered on December 22, 1898, and at the rate charged in the bill of items were worth one hundred and fifty dollars and thirty-five cents. From December to March there were negotiations between the defendant's husband and the plaintiff for a contract by which all the iron work for 811 Beacon street should be furnished by the plaintiff for a fixed sum, payments on account to be made as each floor was finished; ¹⁴² and on or about March 1, 1899, the plaintiff's manager submitted to the defendant a written contract to this effect. On March 10th this was returned by the defendant's husband with the statement already referred to, that 811 Beacon street belonged to his wife, and that the contract should be made with her. No written contract was ever made between the plaintiff and the defendant, but the plaintiff went forward and delivered the iron work for two of the six stories of the house, part being delivered before March 10th and part after that date. The last was delivered on March 18th, when the plaintiff stopped because it had not been paid for what it had done. There-

upon this action was brought to recover the reasonable value of the materials furnished and work done.

At the trial the defendant contended "that the amount of said payments should be credited to her in this action on the ground that they were payments required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that the checks were given to her said husband, as her agent, to make such payments," and "offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him, and claimed that the same should be admitted in evidence. The court declined to admit the same and the defendant duly excepted to the exclusion." The other exceptions taken at the trial have been waived, and the question raised by this exception is the only matter now before us.

The plaintiff has argued that it did not appear but that these instructions were given in a private conversation between husband and wife. But on a fair construction of the bill of exceptions we do not think that the evidence can be taken to have been excluded on that ground. It is stated there that the "defendant offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him." This must be taken to be a statement of the ground of the objection, and the ruling must be taken to be a ruling that competent evidence was offered and was excluded because not made in the presence of the plaintiff or of someone representing it.

143 The judge before whom the case was tried without a jury found "that neither of said payments was required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that neither of them was made according to any agreement for payment to be made on account of said 811 Beacon street, and that no floor in said building was completed at the time either of said payments was made, and that said payments were made by said Bernard Steuer on account of his building numbered 819 Beacon street, and were received by the plaintiff on account therefor."

This finding makes the evidence excluded immaterial so far as the check for two hundred dollars is concerned. If this evidence had been admitted, the defendant's case on the two hundred dollar check would have been this: A check payable to the plaintiff is handed by the drawer to her husband, to be de-

livered by him to the plaintiff in payment of a debt to become due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check, in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt.

In such a case the payee of the check is a bona fide purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud.

The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a bona fide purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice. That was decided in *Watson v. Russell*, 3 Best & S. 34, and affirmed in the exchequer chamber in the same case: 5 Best & S. 968. To the same effect are *Poirier v. Morris*, 2 El. & B. 89 *Nelson v. Cowing*, 6 Hill, 336, 339; *Munroe v. Bordier*, 8 Com. B. 862, and *Armstrong v. American Exchange Bank*, 133 U. S. 433, 453, 10 Sup. Ct. Rep. 450. The case of *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596, might have been decided on this ground but was disposed of on common-law principles.

That payment of a pre-existing debt makes the holder a purchaser for value in this commonwealth was settled law before the negotiable instruments act was enacted: *Blanchard v. Stevens*, ¹⁴⁴ 3 Cush. 162, 50 Am. Dec. 723; *Stoddard v. Kimball*, 6 Cush. 469; *Goodwin v. Massachusetts Loan etc. Co.*, 152 Mass. 189, 199, 25 N. E. 100; *National Revere Bank v. Morse*, 163 Mass. 383, 40 N. E. 180; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570, 47 N. E. 241.

The checks in question in the case at bar were given after the negotiable instruments act (Stats. 1898, c. 533; Rev. Laws, c. 73) went into effect, and are governed by its provisions. The plaintiff is a holder in due course of the two hundred dollar check within Revised Laws, chapter 73, section 69. This section is taken from section 29 of the English bills of exchange act of 1882, and *Watson v. Russell* is cited in *Chalmers on Bills of Exchange*, fifth edition, 89, as an example of a person who is a holder in due course within that section.

It was stated by Lord Russell in *Lewis v. Clay*, 67 L. J. Q. B., N. S., 224, that a payee of a promissory note cannot be a

holder in due course within section 29 of the English bills of exchange act of 1882. In *Herdman v. Wheeler* (1902), 1 K. B. 361, 372, it was pointed out that this statement of Lord Russell's was obiter, and it was also pointed out that in *Herdman v. Wheeler*, as in *Lewis v. Clay*, it was not necessary to pass on that point. The case of *Watson v. Russell*, 3 Best & S. 34, 5 Best & S. 968, does not seem to have been brought to the attention of the court in either of these cases. And in neither case does the court seem to have taken into consideration the practice of a check being procured drawn by another to be used in paying a debt due from the person procuring the check to the person to whom the debtor has had the check made payable. The practice is recognized in case of foreign bills of exchange, and the person procuring the bill is known technically as the remitter of it. See *Munroe v. Bordier*, 8 Com. B. 862, where it was held that the payee of a foreign bill, who took it from the remitter of it for value, was a bona fide purchaser for value. It was this practice which was applied in *Watson v. Russell*, 3 Best & S. 34, in case of a check. In our opinion, a check received by the payee named in it, in payment of a debt due from the remitter of the check, is received by a holder in due course within section 69 of the negotiable instruments act, Statutes 1898, chapter 533, Revised Laws, chapter 73, and that is so even if we should follow the decision made in *Herdman v. Wheeler* (1902), 1 K. B. 361, and hold that a payee never can be a holder in due course to whom the bill has been "negotiated" within ¹⁴⁵ the last clause of section 31 of our act, Revised Laws, chapter 73, which is taken from section 20 of the English bills of exchange act of 1882 (45 & 46 Victoria), chapter 61. The rule that payment of a pre-existing debt makes the holder a holder for value was adopted in Revised Laws, chapter 73, section 42.

But so far as the check for four hundred dollars is concerned, we are of opinion that the evidence should have been admitted. If the defendant's story were found to be true—namely, that she handed the check to the plaintiff's manager at her house—this check would stand on the same footing as the other. But the story of the plaintiff's manager was that the check was brought to him by the defendant's husband, signed in blank by the defendant, and that it was filled up by him for the sum of four hundred dollars, with the husband's consent. We assume in favor of the plaintiff that this is to be interpreted to mean that the only blank in the check, when it was brought to the plain-

tiff's manager by the defendant's husband, was in the amount for which it was to be drawn.

It had been held in England before the bills of exchange act in 1882, that such a piece of paper is not a check; that one who buys it buys an incomplete instrument, and his rights depend upon the real authority which the signer had in fact given in the matter: *Awde v. Dixon*, 6 Ex. 869. See, also, *Hatch v. Searles*, 2 Smale & G. 147; *Hogarth v. Latham*, 3 Q. B. Div. 643; *Watkin v. Lamb*, 85 L. T., N. S., 483; *France v. Clark*, 26 Ch. Div. 257, 262. And see *Ledwich v. McKim*, 53 N. Y. 307. Such an incomplete instrument is *prima facie* authority to fill in the blank: *Crutchly v. Mann*, 5 Taunt. 529; *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, 184. But this *prima facie* authority, as we have said, may be met by evidence of what authority was in fact given, as was done in *Awde v. Dixon*, 6 Ex. 869. If the blanks are filled up before the instrument is negotiated, it does not lie in the maker's mouth to set up that it was incomplete when delivered by him. In such a case, a plaintiff who buys for value without notice gets the rights of a bona fide purchaser for value of a negotiable instrument; and the fact that there was no authority for filling up the blanks as they were filled up, or the fact that the paper was otherwise wrongfully dealt with, is no defense: *Schultz v. Astley*, 2 Bing. N. C. 544; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 712.

¹⁴⁶ In this commonwealth it was held, on the other hand, that a note with a blank for the payee's name was a promissory note and not an incomplete paper which might be made into a promissory note: *Ives v. Farmers' Bank*, 2 Allen, 236. And in *Frank v. Lilienfeld*, 33 Gratt. 377, it was held that the purchaser in good faith of a note in printed form indorsed by the defendant, where the date, payee's name and amount had been left blank, had an absolute right to fill in the amount advanced thereon and to fill up the other blanks. It also has been held here, as it has been held in England, that such a blank, in the absence of other evidence, might be filled in by a bona fide purchaser (see *Androscoggin Bank v. Kimball*, 10 Cush. 373); and that a bona fide purchaser of such a paper which is filed before it is negotiated, has the rights of a purchaser for value without notice: See *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Binney v. Globe Nat. Bank*, 150 Mass. 574, 23 N. E. 380. See, also, in this connection *Herdman v. Wheeler* (1902), 1 K. B. 361.

It is not necessary to consider how a blank check would be dealt with in Massachusetts at common law, where the amount in place of the name or date is lacking. The negotiable instruments act, Revised Laws, chapter 73, section 31, adopted the English law on this point, and it follows that if Newcomb's story is to be believed, the blank check brought to him must be treated as an incomplete instrument and not as a check.

The defendant further contends that it was inadmissible to show the real authority given to the husband in the absence of the plaintiff, and cites in support of that contention *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 78, 93, and *Byrne v. Massasoit Packing Co.*, 137 Mass. 313. These are cases where the act done was within the ostensible scope of the authority given an agent, and for that reason the real authority could not be invoked. The only act relied on as giving ostensible authority to the husband in the case at bar was putting him in possession of the blank check. There was no more ostensible authority here than there was in *Awde v. Dixon*, 6 Ex. 869, *Hogart v. Latham*, 3 Q. B. Div. 643, or *Watkin v. Lamb*, 85 L. T., N. S., 483. An incomplete check gives an authority to fill it up which is only a *prima facie* authority. It does not import an ostensible authority to fill it up which is absolute.

¹⁴⁷ The plaintiff's rights under the blank check for four hundred dollars, and to the money received for it, depend upon the authority actually given by the defendant when she signed it, and the evidence offered should have been admitted in respect of the credit claimed for the four hundred dollars paid under the blank check.

The entry must be, exceptions sustained.

A Transfer of Negotiable Paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder: *Mack v. Prang*, 104 Wis. 1, 76 Am. St. Rep. 848, 79 N. W. 770; *Fitzgerald v. Barker*, 96 Mo. 661, 9 Am. St. Rep. 375, 10 S. W. 45; *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632, 18 S. W. 428. As to whether the original payee of a negotiable instrument may become a bona fide purchaser of it, see *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870, 87 N. W. 190. Bona fide ownership of instruments put in circulation in violation of instructions or conditions is discussed in the monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 314-317.

If a Wife Makes Her Husband agent to deliver a note signed by both, her signature appearing first, she is bound by his representation to the payee that she is principal: *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472, 62 S. W. 1021.

Alteration of Writings by filling blanks is discussed in the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 107-113, on unauthorized alterations of written instruments.

LEVINS v. NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY.

[183 Mass. 175, 66 N. E. 803.]

CARRIERS OF PASSENGERS—Baggage, What is not.—Money not Intended to be Used for Traveling Expenses is not baggage, and, as to it, the common-law liability of a common carrier is not upon a carrier of the passenger to whom the money belongs. (p. 435.)

CARRIERS OF PASSENGERS—When not Liable as Bailee of a Passenger's Money.—If a passenger having a seat in a parlor-car visits its toilet-room, and leaves her purse on the window sill while she washes her hands, and returns to her seat without remembering it, such purse and the moneys therein are not intrusted to the carrier, nor is it even a gratuitous bailee thereof. (p. 435.)

CARRIER OF PASSENGERS—Liability of for Theft of an Employé.—If a passenger leaves her purse, containing money, on the window of a toilet-room of a car, and forgetting it, returns to her seat, and the purse and money are stolen by the car porter, the carrier is not answerable, where the money, not being intended to pay traveling expenses, is not baggage. Under these circumstances, no duty rests upon the carrier to care for the money. (p. 436.)

Tort for moneys claimed to have been stolen by a porter of the defendant while the plaintiff was traveling in a parlor-car owned and operated by it. The plaintiff was traveling on a free pass, but had paid for her seat in the parlor-car. She left her purse on the window sill of the toilet-room of the car while washing her hands, and forgetting it, returned to her seat. Soon afterward she missed the purse and returning for it, found the door of the toilet-room locked. It was opened at once and the porter stepped out. The purse could not be found, though the porter was searched. The trial court directed a verdict for the defendant; the plaintiff alleged exceptions.

G. R. Swasey, and W. P. Thompson, for the plaintiff.

J. L. Hall, for the defendant.

170 HAMMOND, J. The evidence is conclusive that the money lost was not intended to be used for traveling expenses, but for an entirely different purpose. The plaintiff was upon the train, going to her home in the city of New York. She had a pass and a special ticket, upon both of which she relied to get there. She testified that the money had been obtained by a recent sale of certain property in New York, belonging to her mother; that her mother had consented that she might use it in the purchase of an interest in the business of one Snyder in New

York, and that it was "not at all" for traveling expenses, but that she intended to use it for the purpose of going into business. The money, therefore, was not baggage within the legal meaning of that term as used in this connection; and as to it the common-law liability of a common carrier was not upon the defendant: *Jordan v. Fall River R. R. Co.*, 5 Cush. 69, 51 Am. Dec. 44; *Dunlap v. International Steamboat Co.*, 98 Mass. 371, and cases cited. Nor was the money intrusted to the defendant. It was kept within the exclusive control of the plaintiff. The defendant was not even a gratuitous bailee. In a word, the money was not baggage, nor ¹⁷⁷ was it under the care or in the possession of the defendant. Neither as a common carrier, nor as a bailee did the defendant assume any care whatever over it, nor with respect to it did it as such owe any legal duty to the plaintiff. The contract between the plaintiff and the defendant did not cover the money, and the legal relation of the defendant to it after the contract was no other than before. In this respect the case is clearly distinguishable, on the one hand, from that numerous class of cases in which the article lost was baggage within the meaning of the term as used in this connection, in which cases the common-law liability exists, and, on the other hand, from the class of cases, perhaps equally numerous, where the property is delivered into the possession of the carrier, in which cases a liability arises from the bailment. If, therefore, the money had been stolen by any person other than the defendant or some one of its agents or servants, it could not have been said that the loss was in any way attributable to a failure of duty on the part of the defendant.

It is contended, however, by the plaintiff that the jury would have been justified in finding that the money was stolen by the porter, one of the servants of the company; and she insists that in such a case the defendant would be liable. Assuming in her favor, for the purposes of the discussion, that the jury might properly have found that the porter stole it, we do not think that the defendant could have been held liable for the act. It is true that, where there is a duty to be performed by the carrier with reference to the person or property of a passenger and there has been a failure to perform it, the fact that the failure arose from a positive act of a servant to whom the carrier had delegated the performance of the duty is no defense. A familiar instance is where a passenger is willfully assaulted by a servant to whom the carrier has delegated the duty of using proper care to prevent such an assault. Such a case differs from that

where the assault is committed by a servant acting within the scope of his employment, as in *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465, 64 Am. Dec. 83; and the carrier is held, not upon the ground that the assault was committed by his authority, but upon the ground that he failed to exercise his duty to protect the passenger; and hence the declaration in such a case is not for an assault, but for ¹⁷⁸ a failure to prevent one: *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311. Such being the ground of liability, it can make no difference by whom the assault was committed, provided there be negligence shown in the performance of the duty respecting the protection of the passenger.

The plaintiff has failed to show any legal duty resting upon the defendant as to the care of this money lying upon the window sill where the plaintiff placed it. It was not within the scope of the employment of the porter to make any new contract, or to modify one already made. He had a very limited duty as to the performance of contracts already made and the duties of the defendant arising therefrom, and there his power to represent the defendant stopped. If he stole the money, he and not the defendant was the thief, and the act was not the result of any failure of the defendant to discharge its duty. There is no ground upon which the defendant can be held. For similar cases in other jurisdictions, see *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York Central Sleeping-car Co.*, 28 Mo. App. 199.

The conclusion to which we have come upon this ground of the defense renders it unnecessary to consider the others, some of which seem quite formidable, upon which the defendant relies.

Exceptions overruled.

A Passenger is Entitled, as baggage, to a reasonable sum of money for the expenses of the entire journey he contemplates; but money carried for the purpose of trade, investment, or transportation merely, or beyond a reasonable amount for traveling expenses, is not included in baggage: See the monographic note to *Hutchings v. Western etc. R. R. Co.*, 71 Am. Dec. 161; *Railway Co. v. Berry*, 60 Ark. 433, 46 Am. St. Rep. 212, 30 S. W. 764. As to the liability of sleeping-car companies for the theft of money from a passenger, see the monographic note to *Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 536, 337; *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, 26 N. E. 277; *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 74 Am. St. Rep. 53, 24 South. 921.

**McKEON v. NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY.**

[183 Mass. 271, 67 N. E. 329.]

RAILWAYS.—Though a Person is Stealing a Ride on a railway train, and is therefore a trespasser, neither the carrier nor its servant has any right to inflict wanton and reckless injury upon him. (p. 438.)

RAILWAY—Proximate Cause.—If one Stealing a Ride on a Railway Train is Pushed Therefrom by an employé of the carrier, and thereby injured, the act of the employé, rather than the stealing of the ride, is the proximate cause of the injury. (p. 439.)

CARRIERS OF PASSENGERS—Liability of for Act of Brakeman in Pushing a Trespasser from the Train.—If one stealing a ride on a passenger train is injured by being pushed therefrom in a wanton and reckless manner by a brakeman, the carrier is answerable, if the jury believes that the brakeman, in what he did, acted within the scope of his authority. (p. 440.)

Actions of tort, one by a minor for injuries received by being pushed from the platform of a baggage-car of the defendant's passenger train, and the other by the minor's mother for loss of services caused by the injuries.

The plaintiff, with three other boys, was stealing a ride on the front platform of a baggage-car. His and their testimony was to the effect that they boarded the train at Bridgeport, and that just before it pulled into the station at New Haven, the brakeman came out of the baggage-car, took hold of the plaintiff, who was then on the lower step of the platform, and pushed him from the car, so that he fell under it and lost one of his feet.

Plaintiff's testimony as to the speed of the train was that it was going pretty fast, but slowed down a little as it came into the yard at a point about a thousand feet from where the accident happened; and that at the time of the accident, the train was going so fast that he could not get off. A special finding was made by the jury, which also found for the plaintiff in both cases. The defendant alleged exceptions.

W. S. Robinson, for the defendant.

J. B. Carroll and W. H. McClintock, for the plaintiffs.

272 **MORTON, J.** These are two actions of tort which were tried together. That of the plaintiff Joseph is for personal injuries alleged to have been caused by his being pushed off a train while in motion by a brakeman of the defendant. The other, by the plaintiff Ann, who is the mother of Joseph, is for ex-

penses and loss of service consequent upon the injury to Joseph. There was a verdict in each case for the plaintiff, and the cases are here upon exceptions by the defendant to the refusal of the judge to give certain rulings that were requested. There was also an exception in regard to the notice; but as that has not been argued we treat it as waived. The judge submitted to the jury the following question which was answered in the affirmative: "Was the plaintiff pushed off the train by the brakeman, Wilson?" Wilson was the brakeman whom the plaintiff charged with having pushed him off.

The principal questions are: 1. Whether the evidence warranted a finding that the plaintiff Joseph was pushed off by the brakeman; 2. Whether if he was pushed off the evidence warranted a finding that it was done wantonly and recklessly by the brakeman; and 3. Whether the defendant is liable for the conduct of the brakeman.

1. The evidence was conflicting on the question whether the plaintiff was pushed off or whether he jumped off and fell and slipped under the train. But without undertaking to review it in detail we deem it enough to say that we think that the evidence was ample to justify a finding that the plaintiff Joseph was pushed off the train by the brakeman. That was the testimony of the plaintiff and his companions. The weight of it, ²⁷³ and the degree of credibility to which it was entitled were for the jury.

2. We also think that the jury were warranted in finding, as they must have found under the instructions of the judge, that the act of the brakeman was wanton and reckless. There was testimony tending to show that the train was going at a dangerous rate of speed when the plaintiff was pushed off. This fact alone, if it was a fact, would show that the act of the brakeman was wanton and reckless. It tended to show such a disregard of consequences that it could be found that his conduct was entirely inexcusable and therefore reckless and wanton. It is immaterial that he did not intend to inflict the injury that occurred. If he was acting within the scope of his duty the defendant is liable as matter of law for the consequences whether they were in fact contemplated or not. The plaintiff was stealing a ride and was a trespasser, but neither the defendant nor its servants had the right to inflict wanton and reckless injury upon him: *Leonard v. Boston etc. R. R. Co.*, 170 Mass. 318, 49 N. E. 621; *Planz v. Boston etc. R. R. Co.*, 157 Mass. 377, 32 N. E. 356. The proximate cause of the plaintiff's injury

was the act of the brakeman in pushing him off while the train was in motion. And, therefore, although the accident would not have happened if the plaintiff had not attempted to steal a ride, that fact did not contribute, except remotely, to the injury, and had no tendency to show that the plaintiff was not at the time of the accident in the exercise of due care. He was wrongfully on the platform, but he would have escaped without injury save for the act of the brakeman. Due care has regard to the actual situation in which the party is at the time of the alleged injury. The fact that he is a trespasser does not of itself show that at the moment of the injury he is not or may not be in the exercise of due care: *Lovett v. Salem etc. R. R. Co.*, 9 Allen, 557, 563.

3. The remaining question is whether the defendant is liable for the conduct of the brakeman. It is not unless his action came within the general scope of his authority. If it did, then even though he may have gone beyond the proper limits of his authority, and have been guilty of an unjustifiable trespass, the defendant is liable: *Ramsden v. Boston etc. R. R. Co.*, 104 ~~274~~ Mass. 117, 6 Am. Rep. 200. It is not every servant of a railroad corporation that has authority to eject trespassers from its property. In order to justify him in doing so, and to render the corporation liable for his acts, the servant must be acting within the scope of his authority, either express or implied. A conductor has implied authority by virtue of his employment to eject a trespasser from the train under his control: *Ramsden v. Boston etc. R. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, and cases cited. An engineer would probably have like authority to eject a trespasser from his engine. A brakeman has less authority than either. His duties primarily relate, as his name implies, to the management of the brakes. But common observation shows that on passenger trains they embrace much more, and that so far as the management of the brakes on such trains is concerned, their duties have been largely superseded by the appliances in use. On passenger trains brakemen are required to look after the safety and comfort of the passengers, to protect the property of the company, and to see that fares are not evaded. The rules of the defendant company as well as common observation show this. And while the brakeman in question was not in any just sense a conductor or even a subconductor, we think that the jury were warranted in finding as they must have found under the instructions of the judge, that it was within the scope of his authority to remove the plaintiff in a lawful manner from

the platform if he was there for the purpose of evading his fare: *Hoffman v. New York Cent. etc. River R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337.

In *Lovett v. Salem etc. R. R. Co.*, 9 Allen, 557, it was said that it was the right as well as the duty of the driver of a street-car to protect the property of the defendant which had been intrusted to his care and management, and the company was held liable for his conduct in compelling a child who had wrongfully got upon the car to leave it while in motion under such circumstances as to render the attempt to get off dangerous and who while attempting to get off in consequence of the threats of the driver was injured. In *Planz v. Boston etc. R. R. Co.*, 157 Mass. 377, 32 N. E. 356, the court said it preferred to assume without deciding that it was a question for the jury whether the brakeman from his general employment as such had authority to represent the defendant in ordering a trespasser to leave the ²⁷³ train—the implication, so far as there was any, appearing to be that even in the case of a freight brakeman he would have authority by virtue of his employment to eject trespassers from the train. Unless brakemen upon passenger trains have, as incident to their employment, the power to remove trespassers, it would seem that the companies would not receive the full benefit from their services to which they were entitled, and that the brakeman would or might be embarrassed in the discharge of their duties. We think that the jury were warranted in finding that the brakeman was justified in believing from the circumstances under which he found the plaintiff and his companions on the platform, that they were there for the purpose of evading their fare, and that, in doing what he did, he was acting upon that belief and within the general scope of his authority.

It is manifest that the duties of a brakeman on a freight train would or might be different from those of a brakeman on a passenger train, and that fact distinguishes this case from *Marion v. Chicago etc. R. R.*, 59 Iowa, 428, 44 Am. Rep. 687, and *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418, which with other similar cases are relied on by the defendant.

We have not taken up seriatim the rulings requested by the defendant, but they are all embraced so far as material and except so far as given by the judge in the questions which we have considered. The result is that the exceptions must be overruled in both cases.

So ordered.

A Railroad Company owes the duty of ordinary care to a trespasser on its trains, and his expulsion therefrom while the cars are in rapid motion gives him a cause of action for injuries sustained: *Enright v. Pittsburg Junction R. R. Co.*, 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, and cases cited in the cross-reference note thereto; *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446.

STEARNS v. ALLEN.

[183 Mass. 404, 67 N. E. 349.]

CHILDREN.—*The Domicile of a Child* is not within this state if its father has at all times been a citizen and resident of a foreign country, and has never been within the state, though the child was born within, and has never been beyond, the state. (p. 443.)

CHILDREN—*Adoption of—Jurisdiction.*—The statutes relating to adoption are not intended to apply to children who are not subject to the jurisdiction of the commonwealth at the time of the commencement of the proceeding. (p. 443.)

CHILDREN—*Adoption of Where Their Parents are Nonresidents.*—A child born within this commonwealth is by virtue of its birth a citizen thereof and of the United States, though its father is domiciled in a foreign country, and the state has jurisdiction to authorize proceedings for its adoption, and the statute relating to adoptions should be held to apply in such a case. (p. 445.)

CHILDREN, Adopted, Right of Inheritance of.—An adopted child may inherit from a child of one of its adopting parents, if the statute provides that an adopted child shall take the same share in the estate of the adopting parent as if born in lawful wedlock, and shall stand in regard to legal descendants, but to no other kindred of such parent, in the same position as if born to him. (p. 446.)

Two petitions for the appointment of an administrator of the estate of George A. M. Ewer, one on behalf of the uncles and aunts of the decedent, and the other on behalf of Alice L. Knight, who had been adopted by Harry T. and Clara Gibbs Knight, the latter of whom was the mother of the decedent by a prior marriage. The probate court decided in favor of the adopted child, and the uncles and aunts appealed.

H. K. Brown, for the next of kin.

C. C. Buckman, for the administrator representing Alice Louise Knight.

405 KNOWLTON, C. J. These are two petitions for the appointment of an administrator of the estate of one Ewer. The petitioner in one case represents Alice L. Knight, a sister of the intestate by adoption, and the petitioner in the other case rep-

resents uncles and aunts who are the intestate's next of kin. The question is whether the adopted sister or the uncles and aunts succeed to the property of the deceased, and this question may be divided into two parts: First, was the adoption of Alice L. Knight legal and valid; secondly, if it was, does she take as a distributee under the statute.

At the time of the proceedings for adoption, the law in reference to the subject was contained in the Public Statutes, chapter 148, and it was re-enacted without material change in the Revised Laws, chapter 154.

The record shows that the requirements of the statute were exactly complied with if the court had jurisdiction of the case. The petition was made by a husband and wife, each more than twenty-one years of age, in the county of their residence, and the child was much younger than they. In these respects the facts conform to the provisions of section 1 of the statute. It is provided in section 3 that "a giving up in writing of a child, for the purpose of adoption, to a charitable institution incorporated by law, shall operate as a consent to any adoption subsequently approved by such institution." In this case the record shows such a giving up by the mother to such an institution. The written consent of the father was not submitted to the court with the petition, and the court, in accordance with section 4 of the statute, ordered a notice by publication, which was duly given. ⁴⁰⁸ The father did not appear at the appointed time and place to object to the adoption, and so, by the terms of section 5 of the statute, he is held to have consented thereto, so far as relates to the proceedings in the probate court. A decree for adoption reciting the facts was thereupon made in due form.

The appellants attack the jurisdiction of the probate court on the ground that the father of the child was not, and never had been, a resident of this commonwealth, or of the United States, the petition describing him as of Aberdeen, Scotland. The Public Statutes, chapter 156, section 4, is as follows: "The jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or when the want of jurisdiction appears on the same record": See, also, *Dallinger v. Richardson*, 176 Mass. 77, 57 N. E. 227. The only question, therefore, in this part of the case, is whether the record conclusively shows a want of jurisdiction. The only facts which appear of record, touch-

ing this subject, are that the child is described as of Somerville in the county of Middlesex, and as born there a little more than two years before the proceedings for adoption, that the father is described as of Aberdeen, Scotland, and as never having been a resident of the United States, with an averment that the child was brought to the Gwynne Temporary Home for Children in Boston, and given up by her mother to that institution for the purpose of adoption. In the decree the mother is also described as of Somerville.

The appellants contend that the statute does not apply to a case in which the child has not a legal domicile in this commonwealth, and that, upon the facts which appear of record, the domicile of the father was not here, and that the domicile of the child follows that of her father. Upon the recitals before us, the child does not appear to have had a legal domicile in this commonwealth, although she had dwelt here all her life, and in a broad, general sense, was a resident of Massachusetts. The adopting parents resided and had their domicile in Middlesex county.

The appellants rely upon *Foster v. Waterman*, 124 Mass. 592, in which it was held that a statute of New Hampshire authorizing adoption applied only to cases in which the child and the ⁴⁰⁷ adopting parents were domiciled in that state. That statute differs from the law of this commonwealth, inasmuch as the Public Statutes, chapter 148, section 1, expressly authorizes the adoption of a child residing here by a person not an inhabitant of this commonwealth. But we assume that our statute was not intended to apply to a child who is not, or to adopting parents who are not, at the time of the decree, within the jurisdiction of the court. A decree cannot be binding except upon parties of whom the court has jurisdiction. Under the provision just referred to, persons domiciled in another state voluntarily bring themselves within the jurisdiction of the court by filing their petition, and therefore there can be no question as to jurisdiction of the adopting parents. As to the child the case stands differently. If he is under the age of fourteen years, he cannot personally take any part in the proceedings. If he is above that age, his consent in writing is a prerequisite to an adoption. With certain exceptions stated in section 3, the written consent of the parents or of the surviving parent or the guardian must be obtained, and if such consent is not submitted to the court with the petition, notice to the parents or representatives of the child must be ordered by the court.

Taking all the provisions of the statute together, we are of opinion that they are not intended to apply to children who are not subject to the jurisdiction of the commonwealth at the time of the commencement of the proceedings. Probably the legislature did not contemplate proceedings of this kind for the adoption of a child who lives with his parents beyond the boundaries of the state, even if they should voluntarily come into the probate court and consent in writing to the adoption. It is very clear that neither the legislative nor the judicial department of the government can give such proceedings any effect against a child or its parents who do not come into court and who reside together in another state. But the commonwealth has jurisdiction, for many purposes, of persons dwelling here who retain their domicile elsewhere. They are subject to our criminal laws and our police regulations. The commonwealth may provide for them if they fall into distress, and may exercise such control of them as is necessary for their protection, if they are unable to take care of themselves.

⁴⁰⁸ Adoption involves a change of status. So far as the adopting parents are concerned, the change cannot be made without their consent. So far as an infant child is concerned, the state, as his protector, may make the change for him. The natural parents of the child should be considered and their natural rights should be carefully guarded, but their rights are subject to regulation by the state, and if these come into conflict with the paramount interests of the child, it is in the power of the state, by legislation, to separate children from their parents when their interest and the welfare of the community require it. Section 3 of this statute provides that the consent of parents to the adoption shall not be required in certain cases of imprisonment of the parent in the state prison or house of correction, or of willful desertion of the child by the parent, or if he has suffered the child to be supported for more than two years continuously by a charitable institution, or as a pauper, or if he has been convicted of being a common drunkard and neglects to provide proper care and maintenance for the child, or if he has been convicted of certain other offenses, and is guilty of such neglect.

In many of these cases the state may exercise, and ought to exercise, jurisdiction over the child. If the child is actually dwelling in the state, although his father's domicile is elsewhere, the state may as well provide for his adoption as to provide for him in other ways. Although the status of the natural parent

in reference to the child is affected by the adoption, the jurisdiction which gives the right to decree adoption is jurisdiction over the adopted parents and the child, who are the parties whose status is directly decreed. The incidental effect upon the status of the natural parents is only in regard to certain rights of property and the right of control. From the necessity of the case, inasmuch as it has not always been possible to find all the interested parties in the same state, it is enough to establish jurisdiction which is binding upon the natural parent if he is given reasonable notice of the pendency of the proceedings, and an opportunity to be heard: *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147. We are of opinion that if the child is an inhabitant of the commonwealth, especially if his father has abandoned him and his mother also lives here, the mere fact that his father's domicile is ⁴⁰⁰ in another state or country does not deprive the court of jurisdiction under our statute.

In the case at bar the child, by virtue of her birth in Massachusetts, was a citizen of the United States and of Massachusetts, notwithstanding that her father was domiciled in Scotland. The fourteenth amendment to the constitution of the United States provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This has been construed to apply to a case like the present: *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. Rep. 456. See, also, *Gardner v. Ward*, 2 Mass. 244, note, and *Kilham v. Ward*, 2 Mass. 236, 265. This provision alone would give Massachusetts jurisdiction to authorize proceedings for adoption, and our statute should be held to apply to such a case.

On this record the court may have found that the child's father married her mother in Somerville and quickly abandoned her. If these are the facts there is some ground for a contention that the legal domicile of the child, and perhaps of the mother also, is in this commonwealth where they have actually resided. But assuming that their domicile is technically that of the husband and father, our legislature and our courts, under these circumstances, were justified in the exercise of jurisdiction over the child, and in providing for her adoption when a favorable opportunity came to her. We are of opinion that she was legally adopted. For cases in which the law in regard to adoption is considered, see *Sewall v. Roberts*, 115 Mass. 262; *Ross v.*

Ross, 129 Mass. 243, 37 Am. St. Rep. 321; In re Edds, 137 Mass. 346.

The right of the adopted child to inherit from her brother by adoption is stated in Public Statutes, chapter 148, section 7. After providing that as to the succession to property such a child shall take of the estate of the adopting parent the same share that he would have taken if born to such parent in lawful wedlock, the statute adds these words, "and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him." This language seems plain. It gives the adopted child the same right to inherit directly from legal descendants of his adopted parent that he would have if born to the parent in lawful wedlock. The intestate was a legal ⁴¹⁰ descendant—namely, the son of one of the adopting parents. If the adopted child had been born in lawful wedlock to this parent, she would have been the sister of the intestate, and so heir and distributee of his estate. Under this statute she inherits his property.

This view is consistent with all the decisions upon the question that have come to our knowledge, and they all point to the same conclusion: Sewall v. Roberts, 115 Mass. 262; Washburn v. White, 140 Mass. 568, 5 N. E. 813; Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308.

Decrees affirmed.

The Adoption by one person of the children of another, is the subject of a monographic note to Van Matre v. Sankey, 39 Am. St. Rep. 210-231. An adopted child is, in a legal sense, the child of its natural and of its adopting parents, and is entitled to inherit from each: Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761. See, too, Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 93 Am. St. Rep. 201, and cases cited in the cross-reference note thereto.

The Domicile of every person at his birth is the domicile of the person on whom he is legally dependent, whether it is at the place of the birth or elsewhere: Van Matre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628. The domicile of the father is, in legal contemplation, the domicile of his minor children: Grimmett v. Witherington, 16 Ark. 377, 65 Am. Dec. 66; and should the mother survive him, their domicile follows her during widowhood: School Directors v. James, 2 Watts & S. 568, 37 Am. Dec. 525; Succession of Lewis, 10 La. Ann. 789, 63 Am. Dec. 600.

IRVING v. FORD.

[183 Mass. 448, 67 N. E. 366.]

PARENT AND CHILD—Legitimation—Conflict of Laws.—A statute purporting to make legitimate an illegitimate child can have no effect as against its father, who was not, when the statute was enacted, a citizen of, nor resident within, the state, though he was such citizen and resident when the child was born. (p. 448.)

PARENT AND CHILD—Legitimation, Effect of in a Case of Conflicting Domiciles.—The law of the father's domicile at the time of the legitimating act is the law by which to determine the status of both parties. If, by that law, the act in question legitimates a bastard, the beneficial status thus created will, in general, be recognized elsewhere, including the bastard's domicile, though by the law of the latter state, the act is not sufficient to create legitimation. (p. 449.)

Petition filed in the probate court for a distributive share of the estate of Sheridan W. Ford, deceased. That court denied the petition. On appeal, the case was, at the request of the parties by Lathrop, judge, reserved for the determination by the full court.

B. R. Wilson, for the petitioner.

L. A. Ford and D. F. Kimball, for the respondent.

448 LATHROP, J. The question which arises in this case is that left undecided when the parties were before us on a petition to the probate court to amend the record of a petition for administration of the estate of Robert Irving, otherwise known as Sheridan W. Ford, by substituting the name of the petitioner and his mother as the next of kin, and to remove the administrator appointed on an earlier petition: See Irving v. Ford, 179 Mass. 216, 60 N. E. 491.

The case is now before us on an appeal from a decree of the probate court on a petition asking that the petitioner be allowed **449** one-third of the estate of Sheridan W. Ford, claiming to be entitled thereto as a son.

For the purposes of this case it must be considered as settled by the previous decision that the so-called marriage between the petitioner's father and mother in Virginia, while both were slaves, was void, and that the marriage between the common father of the petitioner and of the respondent in Massachusetts was valid; and that the respondent and not the petitioner is the legitimate son of Sheridan W. Ford, unless the statute of Vir-

ginia, passed on February 27, 1866, makes him a legitimate child in this state.

This statute declared that all colored persons cohabiting together on February 27, 1866, should be deemed husband and wife, and all their children legitimate, whether born before or after the passage of the act. The father and mother of the petitioner were not then cohabiting together, and the petitioner's claim is based upon the last clause of the act, which reads as follows: "And when the parties have ceased to cohabit before the passage of this act in consequence of the death of the woman, or from any other cause, all the children of the woman recognized by the man to be his shall be deemed legitimate."

At the time of the passage of this act, the petitioner's domicile was in Virginia, and the domicile of Sheridan W. Ford was in Massachusetts.

We are unable to see any ground upon which the state of Virginia can impose upon a person having his domicile in Massachusetts a legitimate son, when by our law he is illegitimate. By our law it is provided: "An illegitimate child whose parents have intermarried, and whose father has acknowledged him as his child shall be considered legitimate": Pub. Stats., c. 125, sec. 5; Rev. Laws, c. 133, sec. 5. The Virginia act makes mere acknowledgment sufficient, while our law requires both marriage and acknowledgment.

The law which governs this case is well stated by Mr. Minor in his treatise on the Conflict of Laws, section 100. After stating the question, which domicile should govern, when the act of legitimation is not marriage, but mere acknowledgment or a statute of a state, and the bastard has his domicile in one state and his father in another, he proceeds: "Two points should be noticed ⁴⁵⁰ in this connection, which will aid us to determine the proper law in this case. The first is that the legitimation of a bastard is the creation of a status which is beneficial to him, and it should be presumed in his favor whenever adequate reason exists for such a course. The second is that this beneficial status cannot be accorded the infant at the expense of a change of status on the part of the father not warranted by his domiciliary law. Applying these two principles, it follows that the law of the father's domicile at the time of the legitimating act will be the proper law to determine the status of both parties. If by that law the act in question legitimates the bastard, the beneficial status thus created will in general be recognized everywhere, including the bastard's domicile, though by the law of the lat-

ter state the act would not suffice to create a legitimation. On the other hand, if by the law of the father's domicile legitimation is not the result of the act claimed to have that effect, though under the bastard's domiciliary law legitimation would result therefrom, the status of legitimation should not be conferred upon the bastard, for that would be to subject the status of the father to a law which it is not properly subject."

In *Lingen v. Lingen*, 45 Ala. 410, the domicile of the father was in Alabama. The illegitimate child was born in France, having a French woman for its mother. The father while in France acknowledged the child to be his, but he did not marry the woman. This acknowledgment was sufficient in France to make the child legitimate, but not in Alabama. It was held that the legitimation was governed by the law of the father's domicile, and not by that of the bastard: See, also, Wharton on Conflict of Laws, sec. 246.

So in *Loring v. Thorndike*, 5 Allen, 257, 263, where a citizen of this commonwealth had an illegitimate child born in Germany, and afterward married the mother in that country and acknowledged the child there, the legitimacy of the child was determined by the provision of the Revised Statutes, chapter 61, section 4. See, also, *Morris v. Williams*, 39 Ohio St. 554; *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915.

It may be conceded that if the father of the petitioner had been domiciled in Virginia in 1866, when the statute in question was passed, or when he acknowledged the petitioner as his son, the petitioner would have acquired a status as a legitimate son⁴⁵¹ which would be recognized here: *Scott v. Key*, 11 La. Ann. 232; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669. See, also, *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. There are however, decisions to the contrary: *Smith v. Derr*, 34 Pa. St. 126, 75 Am. Dec. 641; *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 South. 783.

But, as the petitioner's father, when the statute was passed and when the acknowledgment was made, was domiciled in this commonwealth, the question of the petitioner's legitimacy must be determined by our law, which does not recognize acknowledgment alone as legitimation; and the order must be decree of probate court affirmed.

On Conflict of Laws in the legitimation of children, see *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 South. 783; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 14 Am. St. Rep. 765, 17 Atl. 964; note to *In re Ingram*, 12 Am. St. Rep. 105.

COLEMAN v. LEWIS.

[183 Mass. 485, 67 N. E. 603.]

NEGOTIABLE INSTRUMENTS—Payment—Failure to Present, When Amounts to.—When a negotiable instrument is received in the conditional payment of a debt, the failure to present it for payment and to give notice of dishonor operates to make such conditional payment absolute. (p. 451.)

COLLATERAL SECURITY—Failure to Present for Payment and Give Notice of Dishonor.—Though the holder of a negotiable instrument taken as collateral security for a debt fails to present it for payment when due or to give notice of dishonor, this does not entitle the pledgor to treat it as a payment for its face value. (p. 451.)

EVIDENCE—General Repute.—The Official Standing of a person cannot be proved by evidence of general repute, but evidence of such repute may, in the discretion of the trial court, be received in connection with other testimony, to show that the pledgor of a negotiable instrument as collateral security had waived its presentment for payment by the pledgee and the giving of notice of its dishonor. (p. 452.)

Action of contract upon two promissory notes. Verdict and judgment for the plaintiff, and the defendant alleged exceptions.

E. F. McClellen, for the defendant.

W. N. Buffum, for the plaintiff.

486 LORING, J. The plaintiff in this case held two notes of the defendant, each of them for two thousand five hundred dollars. On being pressed for payment the defendant handed the plaintiff's agent, as collateral security, three notes, each for one thousand dollars; two were payable to the defendant and were indorsed by him and by him alone, and the third was signed by one Natalie, payable to one Lazaro and indorsed by Lazaro and the defendant. Each of the collateral notes fell due while in the hands of the plaintiff's agent, no one of them was paid, or presented for payment, and no notice of nonpayment was given to the defendant or to Lazaro.

At the trial the defendant asked the judge to instruct the jury that the collateral notes were to be treated as payments for their face value by reason of the failure to present them for payment and to give due notice of their dishonor.

The rule invoked by the defendant is a rule which obtains when a note is taken as conditional payment of a debt. In such case the condition on which the note is given and accepted

is that it shall be duly presented for payment and that if it is not so presented and due notice of its dishonor given, the payment will become absolute. The rule is a rule of the common law and was set forth in Statutes 3 and 4 Anne, chapter 9, section 7, which was enacted to ⁴⁸⁷ remove all doubts as to promissory notes being within the custom of merchants. It is there provided that if any person accept a bill of exchange "for and in satisfaction of any former debt," the same shall be esteemed a full and complete payment if such person "doth not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for nonacceptance or nonpayment thereof."

All the cases cited by the defendant are cases of notes or bills taken as conditional payment, except *Peacock v. Pursell*, 14 Com. B., N. S., 728, and *Whitten v. Wright*, 34 Mich. 92, which are cases where this rule was applied or said to be applicable to notes given as collateral security for a debt and not as conditional payment thereof. To the cases cited by the defendant may be added a dictum of Story, J., in *Lawrence v. McCalmont*, 2 How. 426, 454: See, also, Marshall, C. J., in *Hamilton v. Cunningham*, 2 Brock. 350, 367-370, Fed. Cas. No. 5978.

But we are of opinion that where a note is given as collateral security the doctrine that a failure to present and give notice of dishonor operates as payment does not apply. In such a case, the loss of an indorser's liability through a failure on the part of the pledgee to present the note for payment and to give notice of dishonor to the indorser is material when the defendant undertakes to recover damages for the negligence of the pledgee in his care of the collateral committed to his charge or to set up those damages in recoupment. The conclusion reached in *Peacock v. Pursell*, 14 Com. B., N. S., 728 can be supported on that ground. But the effect of the release of the indorser's liability on these collateral notes through the negligence of the plaintiff's agent as ground for recoupment, apart from the contention that the failure to present and give notice of dishonor operated as payment, was not raised by the rulings requested by the defendant, and the only exceptions before us in this connection are to the refusal to give the rulings requested, and to the charge, so far as it was inconsistent with the rulings requested. No exception was taken to the instruction given by the presiding judge on this point.

There was also an exception to the admission in evidence of testimony to the effect that Lazaro was reputed in the community ⁴⁸⁸ to be of no financial ability. The financial standing of Lazaro could not be proved by general repute: *Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446. See in this connection *Commonwealth v. Loewe*, 162 Mass. 518, 39 N. E. 195. But the plaintiff contends that this was competent because he had testified that he went to the defendant before the Lazaro note fell due and asked him where Lazaro and Natalie lived, and the defendant told him that he did not know, and that it was not necessary for him to take any further trouble to find Natalie and Lazaro as he, the defendant, would very shortly take up the notes. His contention is that this evidence as to Lazaro's financial reputation was admissible as corroborating that story which was evidence that the presentment and notice of dishonor of that note had been waived. We cannot say that the testimony was not admitted for that purpose, and are of opinion that if it was admitted for that purpose its admission was within the discretion of the presiding judge.

Exceptions overruled.

The Effect of Failing to demand payment and give notice of dishonor in the case of negotiable paper held as collateral security is discussed in the monographic note to Griggs v. Day, 32 Am. St. Rep. 719-721. The taking of a note for a pre-existing debt is no payment, unless it is expressly so agreed, or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment: Mitchell v. Hackett, 25 Cal. 538, 85 Am. Dec. 151.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

McBRYAN v. UNIVERSAL ELEVATOR COMPANY.

[130 Mich. 111, 89 N. W. 683.]

CORPORATIONS—Creditor's Bill by Receiver.—Suit by a receiver of a corporation on behalf of a judgment creditor to collect an assessment against stockholders is not prematurely brought, though all of the corporate debts have not been ascertained and leave has not been obtained to institute such suit. (p. 455.)

CONDITIONAL SALES—Erroneous Judgment.—If a contract for the sale of personalty provides that title shall remain in the vendor until notes given for the purchase price are paid, that the vendor may retake the property for default in payment, that payments then made shall be considered as made for use, and that the rental value shall be a certain amount per month, and, in default of any payments on the notes the vendor retakes and sells the property, the consideration for the notes fails, and a judgment for the difference between the amount of the notes and the proceeds of the sale, is erroneous and cannot be sustained. (p. 456.)

JUDGMENT Rendered upon an Illegal Basis cannot be sustained because one might have been rendered upon a legal basis. (pp. 456, 457.)

JUDGMENTS Against Corporations—Effect on Stockholder—Collateral Attack.—A judgment against a corporation, if void, is not conclusive on a stockholder, but is subject to collateral attack. (p. 457.)

JUDGMENTS Against Corporations—Collateral Attack upon by Stockholder.—If a stockholder is able to show even aliunde the record that a judgment against the corporation is wholly void, he may do so as a defense to his liability as a stockholder. (p. 458.)

CORPORATIONS—Stock When Paid up.—If incorporators pass no judgment upon the value of assets turned in as capital stock instead of money, such stock must be considered as paid up, only to the amount of the value of such assets when ascertained. (p. 459.)

CORPORATIONS—Liability of Stockholders.—Original stockholders, who make false statements as to the amount of capital stock actually paid into the corporation, cannot escape liability to its creditors who become such after a transfer of such stock. (pp. 462, 463.)

Moore & Moore, for the complainant.

S. S. Babcock, W. F. Atkinson, Dickinson, Warren & Warren, I. N. Payne and L. M. Butzel, for the defendants.

¹¹² GRANT, J. A corporation, known as the "C. C. Wormer Machinery Company of Detroit," sold and delivered to the Universal Elevator Company, in April, 1896, machinery, at an agreed price of \$9,697.68. No cash was paid down, and two notes were given covering the entire purchase price. The contract of sale expressly provided that the title to the property should remain in the Wormer company until the full sum had been paid; that the rental value thereof was \$750 per month; that said company might at any time enter upon the premises of the defendant company and take possession of the property, and that any money already paid should be considered as having been paid for the use of said property. The machinery was placed in the building erected by the defendant company, and remained there until March, 1897, when the Wormer company took possession of it and sold the most of it. Whether it had been used does not appear. The elevator company was a failure, and in August, 1896, Mr. Livingstone took possession of the building and its contents, under a deed made to him by the elevator company. The Wormer company sued the elevator company, declaring on the common ¹¹³ counts, and for the use and occupation of machinery, etc. A plea of the general issue was interposed. Whether any further steps were taken to defend the suit the record does not show. The judgment, as appears by the testimony of the agent of the Wormer company, Mr. O'Hara, taken at the trial, was for the difference between the value of the machinery when taken back and the amount of the notes, with interest and insurance premiums added, paid by the Wormer company. Judgment was rendered for \$4,997.69. Execution was issued and returned nulla bona. The Wormer company then filed a judgment creditor's bill, and obtained a receiver, Mr. McBryan, the complainant in this case. Complainant thereupon filed this bill against the elevator company and the other defendants, who are stockholders, alleging that the stock was not fully paid, and praying an assessment against the stockholders to pay this and other debts of the company.

The original stockholders were: Moore, 2,500 shares; Brotherton, 675 shares; Stanton, 1,000 shares; James N. Schoonmaker, 750 shares; Frank E. Schoonmaker, trustee, 700 shares; Frank E. Schoonmaker, 700 shares. The other defendants subsequently

became stockholders. The defenses made as to all of the defendant stockholders are:

1. That this action was prematurely brought, because all the corporate debts have not been ascertained, and no leave obtained from the court to institute this suit against the stockholders.

2. That the assets conveyed to the corporation at the time of its organization were worth the sum of \$63,250, the amount of the capital stock shown by the articles of association to have been actually paid in.

3. That the judgment is void, under *Perkins v. Grobben*, 116 Mich. 178, 72 Am. St. Rep. 512, 74 N. W. 469, because the Wormer company took its property in accordance with the contract of sale, and cannot now sue for the purchase price, and that the judgment against the company is not conclusive in a suit against the stockholders.

Proofs were taken in open court, and the bill dismissed.

¹¹⁴ The history of the organization of the defendant company, and the relation of all defendants thereto, except Bierce, John and Charles Duffie, and Leavitt, are given in *Moore v. Universal Elevator Co.*, 122 Mich. 48, 80 N. W. 1015, and it is unnecessary to repeat them here.

1. This suit was properly launched. No application to the court for leave to bring suit is required: Chancery Rule No. 31; 3 Comp. Laws, secs. 10841, 10842. A judgment creditor is entitled to maintain a bill to seek assets to satisfy his judgment and execution: *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 392, 21 N. W. 375; *Young v. Erie Iron Co.*, 65 Mich. 111, 127, 31 N. W. 814. Other creditors can come in under such a proceeding if they so desire, and the court may make an order for serving notice upon them. A judgment creditor is under no legal or moral obligation to bring in other creditors. He may proceed to secure his own rights independent of them. The bill in this case is substantially the same as that in *Young v. Erie Iron Co.*, 65 Mich. 387, 31 N. W. 814, the only difference being that in that case the receiver in his petition stated that he instituted the suit for himself and other creditors who should choose to come in, while this bill contains no such allegations. The bill, however, is broad enough to include other creditors who may choose to come in, for one of the prayers is that the debts of the defendant company may be ascertained and decreed.

2. Was the C. C. Wormer Machinery Company entitled to the judgment it took? The title to the machinery did not

¹¹⁵ pass, but was expressly reserved in the vendor. The vendor retook it under its contract, and, as stated by counsel for complainant, who was the attorney for the Wormer company, "sold the property for its then value, 'the then selling price, which was all that we could get for it,' applied the amount on the notes, and brought suit against the elevator company for the balance." The record is conclusive that the judgment was taken for the difference between the contract price and the estimated value when retaken.

In *Perkins v. Grobben*, 116 Mich. 172, 72 Am. St. Rep. 512, 74 N. W. 469, the contract provided that the title should not pass until full payment, and that all payments made on the notes which were given for the purchase price should be deemed "to be payments for the use, wear and tear of the property up to the retaking thereof." There is no substantial difference between the above provision of that contract and the one in this providing that the monthly rental value of the property was \$750, if such provision be conclusive as an implied contract to pay that amount as rental if the vendor should retake the property. In that case money had been paid, while in this case none had been paid. But that difference cannot change the rule of law. The notes were given in consideration of the property contracted to be sold. When the property was retaken under the contract, there was no longer any consideration for the notes. The only remedy open to the vendor in such case is to sue for the rental value, or bring a suit for damages for nonperformance of the contract. He cannot bring suit to recover the purchase price, or any part thereof. A defense upon this ground would, therefore, have been fatal to the plaintiff's right of action, based upon the theory upon which the judgment was rendered. The judgment is, of course, valid as against the defendant elevator company, and is not open to a collateral attack by it. The judgment could only be set aside by that company upon a direct proceeding for that purpose.

¹¹⁶ It is also urged that the judgment should be sustained because judgment for a larger amount might have been rendered for the rental of the property, and therefore the stockholders are not prejudiced. Counsel for the defendants challenge the right to recover the rental during the time claimed by the complainant. Upon this question, as well as upon the construction of the contract, the defendant company was entitled to be heard in the suit at law. A judgment rendered

upon an illegal basis cannot be sustained because one might have been rendered upon a legal basis.

It is claimed that the Wormer company retook this property by agreement. Whether Mr. Moore, the president of the company, had any authority to make such an arrangement, we need not consider. All Mr. Moore said to the agent of the Wormer company was to advise him that he had better take back his property, and dispose of it. This did not make a new contract. It was advice simply to the company to take advantage of the contract it had made.

Is the judgment conclusive against a stockholder? While it is the general rule that judgments against corporations are conclusive upon the stockholders, an exception is equally well established in cases where judgments are rendered through fraud or collusion, or without jurisdiction: 3 Thompson on Corporations, secs. 3392, 3400; 2 Morawetz on Private Corporations, sec. 865; 1 Cook on Corporations, sec. 209; Bohn v. Brown, 33 Mich. 257, 263. In Bohn v. Brown, 33 Mich. 257, this court said: "If the proceedings against the corporation should appear to be tainted by fraud or collusion between the claimant and the corporation, the judgment would not be good as inducement, or as an adjudication to fix the liability of the stockholder through it, or to fix the amount, and the suit against the stockholder would fail inevitably."

This exception is approved in the following cases: Irons v. Manufacturers' Nat. Bank, 36 Fed. 843; Schrader v. Manufacturers' Bank, 133 U. S. 67, 10 Sup. Ct. Rep. 238; Slee v. Bloom, 20 Johns. 669; Warrington v. Ball, 33 C. C. A. 609, 90 Fed. 464; Saylor v. Commonwealth etc. Banking Co., 38 Or. 204, 62 Pac. 652; Ward v. Joslin, 44 C. C. A. 456, 105 Fed. 224.

¹¹⁷ In Schrader v. Manufacturers' Bank, 133 U. S. 67, 10 Sup. Ct. Rep. 238, judgment was rendered against the bank on a contract of guaranty. In a suit against the stockholders to enforce their liability as such, it was held that they could go behind the record of the judgment, and show that the guaranty of the bank had been released by the release of the principal debtor before judgment was taken against the bank. In Slee v. Bloom, 20 Johns. 669, it was said that a judgment "is not of itself, as *res judicata*, binding on the stockholders, if it was procured by fraud, or is founded in error." In Warrington v. Ball, 90 Fed. 464, the defense set up was that the judgment was obtained by collusion between the plaintiff and the representatives of the bank, and that the certificate of de-

posit on which the judgment was based was issued for money furnished to the cashier personally. The judgment was held not to be conclusive upon the stockholders. The opinion says: "To bind one by a judgment to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion would be intolerable."

In *Saylor v. Commonwealth etc. Banking Co.*, 38 Or. 204, 62 Pac. 652, the judgment against the corporation was based upon a promissory note executed by the president and secretary of the corporation to the president, and plaintiff sought to enforce payment of the judgment by assessments against the stockholders for unpaid subscriptions. It was held that they could attack the validity of the judgment upon the ground that the execution of the note had not been authorized by the directors. See, also, *Mandeville v. Reynolds*, 68 N. Y. 528, and *Conway v. Duncan*, 28 Ohio St. 102, in which judgments were held not conclusive.

We think the principle approved in these decisions is sound, and that when a stockholder can show, even aliunde the record, that the judgment is wholly void, he may do so as a defense to his liability as a stockholder.

3. We might rest here without determining the important questions raised as to the value of the assets which comprised the value of the capital stock issued as fully ¹¹⁸ paid, and as to the liability of the original and subsequent stockholders, but the record and briefs are mainly devoted to these questions. There are other creditors of the defendant corporation who are entitled to come in, prove their claims, and enforce the liability of the stockholders, if there is any. The parties have been subjected to large and expensive litigation, which ought to be brought to an end. We should, therefore, dispose of these questions.

The duty of the incorporators in putting in property as paid-up capital stock is fully stated in *Moore v. Universal Elevator Co.*, and needs no further discussion by us. The original incorporators exercised no judgment whatever upon the value of the assets transferred to the corporation by Schoonmaker Bros. & Co. as worth \$63,250, and for which stock was issued to that amount as fully paid. No one asked, and no one volunteered an opinion, as to their value. Moore, Stanton and Brotherton, the only original incorporators of any financial responsibility, testified that they did not ask or consider the

value of the assets. They considered themselves as mere dummies to sign the articles of incorporation, make the solemn assertion and certification that stock of the value of \$63,250 had been actually paid in, and that they each had subscribed for a certain number of shares. They believed that they could immediately transfer their stock to the Schoonmaker Brothers without incurring any liability whatever. They testified that an attorney, who was present, so advised them. This attorney was not produced as a witness. Frank E. Schoonmaker was not a witness. James N. Schoonmaker testified that he did not know the value of these patent devices. This case, therefore, affords no room for the application of the rule of *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814, that "corporators are not responsible for an honest error of judgment, or a mistake, in placing a valuation upon property appropriated or used as capital," and as approved in *Graves v. Brooks*, 117 Mich. 424, 75 N. W. 932. In cases where the incorporators passed no judgment upon the value of the assets¹¹⁹ turned in as capital stock instead of money, the only course left open to courts, when called upon to determine whether the stock has been fully paid, is to ascertain the actual value of the property which was turned in as capital stock, and hold that the stock is only paid to the extent of the value of the property so found. This brings us to the question of the value of these assets.

We found in *Moore v. Universal Elevator Co.*, 122 Mich. 48, 80 N. W. 1015, that the property conveyed was not worth the amount stated in the articles of association, and that as to the Schoonmakers and Hultgren it was a fraud in fact, and that as to the other parties it was a fraud in law, if not in fact. The assets put in to form a corporation with \$63,250 of capital stock fully paid in are as follows: Elevator patents, \$27,000; business in the Otto Gas Engine Company, \$10,000; factory and property, \$15,500; business incidental with mechanical engineering, \$10,750.

Schoonmaker Bros. & Co. were agents for the Otto Gas Engine Company. That agency was revocable at any time. Schoonmaker Bros. & Co. could not transfer it to the elevator company without the assent of the gas engine company. There is no evidence of any such arrangement with that company, or any agreement that the gas engine company would accept the elevator company as its agent. It may be inferred from the record that the gas engine company raised no objection to the

elevator company's acting as its agent during the time the latter carried on business. It appears from the depositions of the officers of the Otto Gas Engine Company that the commissions paid Schoonmaker Bros. & Co. were as follows: 1893-94, \$337.90; 1895, \$1,043.34; 1896, \$1,399.91; 1897, \$1,160.73. Out of this, however, were to come Schoonmaker Bros. & Co.'s expenses, and it is not shown how much these were. At the same time Schoonmaker Bros. & Co. were selling elevators for Morse, Williams & Co., of Philadelphia, and had the exclusive agency for the Variety Machine Company, a manufacturer of hand elevators. Is a revocable commission agency, yielding from ¹²⁰ \$300 to \$1,400 a year, worth \$10,000 as part of the capital stock of a corporation organized for another and entirely different purpose? If this contention were sustained, it would result that three or more agents, having no tangible property, might form a manufacturing corporation of \$20,000 to \$100,000, fully paid up, by simply putting in their revocable agencies as salesmen. This is not the tangible property which the statute requires to constitute a part of the paid-up capital stock of a corporation. It was an intangible asset, of no value whatever to the creditors of the elevator company.

"Business incidental with mechanical engineering, \$10,750." No tangible property whatever, except perhaps \$150 worth of tools used by Schoonmaker Bros. & Co., was included in this asset, and I find no evidence that these tools became the property of the corporation. Schoonmaker Bros. & Co. employed from three to five men in connection with their business as agents for the three companies, viz., the gas engine company, the Variety Machine Company, and Morse, Williams & Co., for whom they sold elevators. Naturally, Morse, Williams & Co. would not employ the elevator company to act as their agent when it was engaged in a rival business. James N. Schoonmaker testified that this item "was for our business as experts; our ability to carry on the business; our skill. It didn't represent any tangible property. There was no contract made by which we were to work for the company." Mr. Schoonmaker was unable to tell whether there was any profit in the agency, and, when asked upon what he based or computed the agency to be worth \$10,000, replied, "As to the possibility there was in the business we were doing." What is the cash value of a possibility, and that a possibility which Schoonmaker Bros.

& Co. had not contracted to continue for the benefit of the corporation?

Within four months after the making and filing of these articles of association, the directors of the elevator company made and filed a statement of their assets and liabilities, in ¹²¹ which these two items disappeared as a part of the capital stock. In that statement the only assets are: Cash paid in, \$17,000, and five United States patents, \$46,250. Not only was this done, but the stock issued for the item of "Business incidental with mechanical engineering" was surrendered and canceled. To hold that this action on the part of the incorporators was in compliance with the statute, which, under the decision in *Young v. Erie Iron Co.*, 65 Mich. 387, 31 N. W. 814, at least requires that the incorporators pass an honest judgment on the value of the assets put in as capital stock, would defeat the purpose of the statute, and render it utterly valueless. If the statute required the articles of association to state the property put in as capital stock, it might be held that creditors should deal with the corporation at their own risk. But until the legislature sees fit to enact such a provision, incorporators must be required to act in good faith in placing values upon property put in as a part of paid-up capital stock, and the right of those dealing with the corporation to rely upon these solemn statements must be preserved.

There was no factory in existence at the time the company was organized, but it had bonus subscriptions, amounting to something like \$8,000, and a bonus subscription of an acre and half of ground on which to place the factory. There was no other property at that time, except those bonuses.

The one-third interest in the patents, which was turned in at \$27,000, consisted of a one-third interest in five devices used in making elevators. There were other devices used by other companies designed to accomplish the same purposes. Mr. Hultgren, the patentee, and Mr. Ellithorpe, who was interested with him, estimated these devices as worth much more than the interest conveyed by Mr. Hultgren to the elevator company through the Schoonmakers. An attorney, an expert in patents and their value, testified that these devices were of little value. As against these opinions, what are the facts? Mr. Hultgren sold one shop right to a company in Springfield for \$200. This gave ¹²² that company the right to manufacture only in Springfield, but the right to sell anywhere in the world. He also received, for a similar right, about \$200.

or \$300 from an elevator company in Chicago, in 1891-92. He has received no royalty since, because that company ceased to use the device. He was employed by the Michigan Elevator Company at a salary of \$2,000, requiring him to devote his whole time to the business. This salary included the right to use his devices. He worked for an elevator company in Toledo at \$1,800 a year, which included his services and the use of one of his devices. Mr. Hultgren refused to sign the articles of association, "because I couldn't see where any money would be forthcoming by which it would place us in a position to manufacture"; and that, although the assets, in his judgment, were worth \$63,000, yet they would not give the company any credit. If these patent devices are of the value placed upon them by Hultgren and Ellithorpe, the receiver ought to be able to sell a one-third interest in them for something; but none of the parties to this litigation have seemed to regard them as of sufficient value to justify an attempted sale, and no one has offered to buy such valuable property. These facts are much more convincing than the opinion of interested parties. I reach the same conclusion that was reached in *Moore v. Universal Elevator Co.*, 122 Mich. 48, 80 N. W. 1015, that these devices were practically worthless.

4. It is urged on behalf of Moore, Stanton, and Brotherton that they had transferred their stock before the debt of the Wormer company was contracted, and that therefore they are not liable. No question of the bona fide transfer of stock is involved. The question is, Can original incorporators make a false statement as to the amount of capital stock actually paid in, and escape liability for such false representations, immediately after executing the articles of association, by transferring their stock to other parties? The wrong was done by the original incorporators in making a false statement as to the amount of stock actually paid in. The public, and creditors dealing ¹²³ with the corporation, had the right to rely upon this statement as true. Subsequent purchasers of stock were also entitled to rely upon it as true. It would be unjust to visit the sins of the original incorporators upon subsequent stockholders who purchased in good faith. It would be a disgrace to the law if creditors, dealing with the corporation in reliance upon these statements, which they examine in the public offices, where they are on file, had no remedy. Justice and good morals require that they who make such false statements, whether they make them intentionally or, as in this

case, recklessly, should respond in damages therefor. The law does not permit them to evade this liability by a transfer of their stock.

I think the decree should be modified in accordance with this opinion, and the case remanded, with directions to the receiver to sell the interest in the patent devices, if a purchaser can be found, and to apply the proceeds thereof in payment of the judgment in favor of the Wormer company, and to proceed under the order and direction of the court below to assess the original incorporators to pay other debts, should any be proven; but my brethren think the decree should be sustained, with costs, and it is so ordered.

MOORE, J. I do not think the disposition of the case requires the discussion under head 3 of the opinion, and express no opinion in relation to the question there discussed. I concur in the disposition of the case made by Justice Grant.

Hooker, C. J., and Montgomery, J., concurred with Moore, J.

Long, J., did not sit.

**JUDGMENT AGAINST CORPORATION—EFFECT OF AS
AGAINST STOCKHOLDER.**

I. Conclusiveness of Judgment Generally.

- a. Effect of Want of Service of Proofs on the Stockholder.
- b. Nonresident Stockholders.
- c. Default Judgments.

II. Judgment When not Conclusive.

- a. Fraud, Mistake or Want of Jurisdiction.
- b. Special Defenses.

III. New York Rule.

I. Conclusiveness of Judgment Generally.

A judgment regularly obtained against a corporation is conclusive evidence of its indebtedness in a suit by one of its creditors against a stockholder to recover the amount remaining unpaid upon his stock, unless it is shown that such judgment was procured by collusion, fraud, or mistake. In other words, there seems to be no doubt at the present time that a judgment by a court of competent jurisdiction against a corporation is conclusive evidence of debt against its stockholders, to be avoided by them only on proof of fraud, collusion, or mistake, and not upon original grounds, and they are therefore generally bound by the judgment against the corporation requiring it to levy and collect unpaid assessments on stock. Hence a judgment against a corporation is conclusive and binding upon a stockholder as to his statutory liability until reversed or shown to be fraudulent, and it is thus conclusive upon him in a subsequent action against him by the same plaintiff: *Schertz v. First Nat. Bank*, 47

Ill. App. 124; Donworth v. Coolbaugh, 5 Iowa, 300; Corse v. Sanford, 14 Iowa, 235; Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725; Miliken v. Whitehouse, 49 Me. 527; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576; Holland v. Duluth etc. Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15; Hovey v. Ten Broeck, 3 Robt. 316; Heggie v. People's etc. Assn., 107 N. C. 581, 12 S. E. 275; Wilson, McElroy & Co. v. Stockholders etc. of Pittsburgh etc. Coal Co., 45 Pa. St. 424; Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. Rep. 867; Powell v. Oregonian Ry. Co., 38 Fed. 187; Stutz v. Handley, 41 Fed. 531.

In many of the states individual liability of a stockholder arises after a judgment has been rendered against the corporation and when an execution thereon has been returned nulla bona; and, in the absence of fraud on the part of the officers, such return is conclusive, as against the stockholder, that the corporate property has been exhausted. Hence, the judgment is conclusive against the stockholders, and can be impeached only for fraud or want of jurisdiction: Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725. A judgment against a corporation for the recovery of money is conclusive evidence, in a suit against a stockholder for the collection of such judgment of the existence of the corporation and its liability to plaintiff therein as thereby determined, and such judgment, whether given in an action *ex contractu* or *ex delicto*, is thereafter an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock: Powell v. Oregonian Ry. Co., 38 Fed. 187.

“Whatever may have been the nature of the plaintiff's claim, whether just or unjust, conscionable or unconscionable, his judgment, if regularly taken in a court of competent jurisdiction, and in accordance with the course and practice of the court, created a lien upon any property owned by the defendant corporation, and its payment may be enforced by execution, or, if execution is returned unsatisfied by proceedings supplementary to execution, and the judgment cannot be attacked or impeached by any member of the defendant corporation, or its creditors, except for fraud or collusion. The corporation represents the shareholders in defending actions involving the rights and obligations of the corporation, and, in the absence of fraud or collusion, binds them, and individual stockholders cannot assert or defend the rights of the corporation”: Heggie v. People's etc. Assn., 107 N. C. 590, 12 S. E. 275. “The appellants offered to show that the indebtedness for which plaintiff's judgment against the corporation was recovered arose upon a contract which was *ultra vires*. The evidence was excluded, and this ruling is assigned as error. The question is thus presented, whether such judgment is conclusive upon the stockholders of the corporation in this action, and that it is we entertain no doubt. The object of this suit is to compel the corporation against whom the judgment was re-

covered to satisfy the same out of its assets, and it is not competent for the defendants, who are simply called upon to pay what they owe to the corporation, in order that its obligations may be discharged to reopen the question whether, upon the facts, the plaintiff ought to have had judgment against the corporation. The judgment was a conclusive determination of that fact as against the corporation and all persons in privity with it, and carries with it, without relitigating the facts upon which it is based, the undoubted right of enforcement against the property of the corporation, and that is all that is sought in this case. A corporation represents and binds its stockholders, in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights, and in the bringing and defending suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. It must necessarily follow, from the nature of this corporate power, that a judgment against a corporation for an alleged corporate indebtedness is conclusive upon it and of the right of the creditor to subject its property to the satisfaction thereof, and, in the absence of fraud, equally conclusive upon the stockholder when it is sought to satisfy the judgment out of the assets of the corporation in his hands": *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 162, 27 Pac. 674, 30 Pac. 776.

In a proceeding to enforce the individual liability of a stockholder, a judgment against the corporation, rendered by a court having jurisdiction, will in the absence of fraud and collusion be deemed to be final and conclusive as to the amount of the indebtedness and the liability of the corporation to pay it: *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875.

After citing cases to the same effect, the court, in *Holland v. Duluth etc. Co.*, 65 Minn. 329, 68 N. W. 50, said that "the force of these decisions seems to be admitted by counsel for the defendants here, but they insist that there is a distinction in principle, as to the effect or conclusiveness of judgments against corporations, between the cases in which actions are brought against stockholders on account of unpaid subscriptions and those wherein the object is to enforce the statutory or constitutional liability, the ground for distinguishing being that anything due for unpaid subscriptions is an indebtedness to and an asset of the corporation, while the statutory or constitutional liability is not. Because this liability is to creditors only, and is not a corporate asset, nor can the corporation enforce it. Counsel urge that when the action is based upon it there is no privity of interest between the corporation and its stockholders by reason of which the latter are concluded by a judgment against the former, or which can even make the judgment prima facie evidence of a corporate indebtedness. It seems to be conceded by counsel that, to the full extent of the corporate property, and whenever its assets are to be reached, there is this privity of interest, and the stockholders are

bound by the judgment. Reduced to a simple proposition, the position of counsel is that when the purpose of the action is to enforce a direct liability to the corporation, the stockholders cannot question the judgment, but if the liability is indirect, arises only when the corporation assets are insufficient to satisfy the debts, and can only be enforced by the creditors, the judgment is ineffectual for any purpose. When we consider the character of stock corporations, the powers and duties of the officers selected and authorized to manage them, it is not an easy task to demonstrate upon principle why a judgment against the body corporate should sometimes and under some circumstances bind the stockholders, and not at all times and under all circumstances, or why stockholders are privies in interest, and therefore concluded by the judgment when their liability to respond to the full extent of amounts due on unpaid subscriptions is involved, and not privies in interest, and not bound by the judgment, when the same creditor undertakes to compel response to statutory or constitutional liability to pay the same judgment. Both liabilities are incurred at the same time, and by the same act, namely, by the act of subscribing for stock. The subscriber then becomes obligated to pay for his shares and also to pay an amount equal to their face value, if necessary, and his liability is as definitely fixed in the one case as in the other." After referring to the conflicting cases in the state of New York the court proceeded to say: "Certainly, the rule in New York is not settled, and, in our judgment, the logic of the reasoning adopted in some of their cases, in support of a conclusion that to the extent of the corporate property or assets the shareholders are bound by the judgment, tends thoroughly to establish the doctrine which seems to prevail in this country that, as the statutory or constitutional liability is an obligation voluntarily assumed by the stockholder when he subscribes for his shares, the officers of the corporation represent him as to that liability to the same extent as they do when his ordinary liability assumed by the same act of subscription is involved. The officers of the corporation, in the absence of fraud or collusion, can bind the stockholders, and fasten upon them obligations which cannot be questioned by the latter. The officers cannot only make the corporation liable to the full extent of the corporate assets, but they can also fasten the statutory or constitutional liability upon the stockholders. This liability is incident to taking stock and is incurred by the subscriber. When subscribing for his shares and entering into the organization, he undertakes the responsibility for the result of litigation in which the corporation becomes involved, to which he is not a party, and has not been given an opportunity to defend personally. He is then represented by officers who are not only authorized to take charge of all litigation, but whose duty it is to do so; and why should not those whom the officers represent be held privies in interest, and concluded by the result, in the absence of fraud and collusion. There would seem to be no middle

ground on which to place a judgment against the corporation, and, if the stockholders are bound under any circumstances, they must be under all. This is the conclusion of nearly all of the courts, although their reasons are not always the same": *Holland v. Duluth etc. Co.*, 65 Minn. 331, 60 Am. St. Rep. 480, 68 N. W. 50. To the same effect, *American Nat. Bank v. Supplee*, 115 Fed. 657. In *Nichols v. Stevens* 123 Mo. 96, 45 Am. St. Rep. 515-522, 25 S. W. 578, 27 S. W. 613, the court said: "Whatever may have been thought at a former period, and in some jurisdictions, as to the effect upon a stockholder of a judgment rendered against his corporation, at the present time, the execution and organization of a corporation having been established, a judgment against such corporation, being proved, is conclusive evidence of debt against its stockholders, where the plaintiff in the original and the primary and auxiliary actions is the same, in the absence of collusion, fraud, etc., and not upon original grounds. Except on the grounds before mentioned, it is out of the power of a stockholder to go back into the original consideration of the judgment against the corporation, that the indebtedness for which the judgment was rendered was the debt of the president, and not of the corporation. Such judgment against the corporation is valid against a stockholder, until reversed by him in some direct proceeding for that purpose and cannot be attacked collaterally." "There is privity of course, between a corporation and its shareholders in respect to corporate rights and liabilities, and it results necessarily that a judgment or decree against a corporation is conclusive upon the owners of stock in respect to their rights as shareholders. In other words, such judgment or decree is not open to collateral attack by a shareholder for the purpose of asserting or protecting his interests as a shareholder": Per Woods, C. J., in *Andrews v. National Foundry etc. Works*, 76 Fed. 172. It has been decided that a judgment against a corporation is conclusive upon the stockholders, so that they cannot maintain a suit in equity to set it aside, after the corporation has made every defense against the judgment: *Hendrickson v. Bradley*, 85 Fed. 508.

a. Effect of Want of Service of Process on the Shareholder.—A judgment against a corporation by court of competent jurisdiction is generally, in the absence of fraud, conclusive against a shareholder, not personally served with process and who has no actual notice of the proceeding against the corporation, the doctrine being that he is bound by representation through the corporation: *Mason v. Force*, 30 Ga. 99; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610. Except in cases of fraud, a decree against a corporation is conclusive against a stockholder thereof, even though there was no personal service upon him: *Glenn v. Springs*, 26 Fed. 494. It has, however, been held that in respect to rights arising out of contracts other than subscriptions for stock, a shareholder is not bound by a judgment or judicial decree against his corporation to which he was

not made a party and personally served with process: *Andrews v. National Foundry etc. Works*, 76 Fed. 166. This is equivalent to asserting that a shareholder is not bound by a judgment against the corporation at all, for if he is made a party defendant and is served with process, the judgment must be conclusive upon him, not so much because it is against the corporation, as because it is against the stockholder directly, jurisdiction over him being founded, as in other cases, upon the personal service of process upon him.

b. **Nonresident Stockholders.**—A decree of a court of competent jurisdiction in an action against a corporation by its creditors is binding upon a stockholder, although he is a nonresident and not personally served with process, and though he never appeared or had notice of such suit. In such case he is represented by the corporation and bound by the decree: *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610. A decree of a court of competent jurisdiction in one state making assessments on the shares of stock of a corporation of that state is binding on stockholders residing in another state, although they were not parties to the suit and not served with process: *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363, 40 Atl. 275. A judgment against a bank, adjudging it liable for an assessment as a stockholder in another bank, is conclusive upon its stockholders as to such liability, and a stockholder sued on such liability in another jurisdiction to enforce his statutory liability cannot set up the want of power in the bank to become a subscriber to the stock of another corporation: *Martin v. Wilson*, 120 Fed. 202; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. Rep. 506. In an action brought by a receiver of a foreign corporation in one state to enforce the double liability of a nonresident stockholder in a corporation formed in another state, it was held that such nonresident stockholder was bound by the decree of the court of the state in which such corporation was formed and in which the parent suit was instituted and judgment rendered against it. In such case it is not essential that nonresident stockholders, who are not in the reach of the process of the court and against whom it cannot render a personal judgment, shall be made parties to such suit, because for the purpose of ascertaining the assets and liabilities of the corporation, they are represented by the corporation, or by its general receiver appointed prior to the institution of the suit, and as to such matters they are bound by the adjudication though not personally made parties: *Fish v. Smith*, 73 Conn. 37, 84 Am. St. Rep. 161, 47 Atl. 711; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714. To the same effect: *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Hawkins v. Glenn*, 131 U. S. 329, 9 Sup. Ct. Rep. 739; *Hale v. Hardon*, 95 Fed. 747.

c. **Default Judgments.**—In the absence of fraud or collusion, a judgment by default against a corporation is valid and binding against a stockholder, as to his statutory or constitutional liability or for unpaid stock subscriptions, until reversed in some direct proceed-

ing for that purpose, and cannot be collaterally attacked: *Holyoke Bank v. Goodman etc. Mfg. Co.*, 9 Cush. 576; *Holland v. Duluth etc. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; *Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613. Such judgment has, however, in one instance, been held not to be conclusive upon nonresident stockholders who were not served with process and had no opportunity to defend therein: *Sumner v. Marcy*, 3 Wood. & M. 105, Fed. Cas. No. 13,609. A judgment against a corporation secured by default may, it seems, always be attacked by stockholders for fraud and collusion, in a supplemental suit to recover from them upon their stockholdings, and such an attack is not deemed collateral: *Town of Hinckley v. Kettle River R. R. Co.*, 80 Minn. 32, 82 N. W. 1088. The facts constituting actual fraud must be clearly stated in the answer of the stockholder as a ground of defense: *Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613. Thus, if the president and secretary of a corporation, without the knowledge, or under authority of the board of directors, execute a note of the corporation to the president thereof, on which a default judgment is subsequently rendered against the corporation after service on the president, the stockholder of the corporation are not estopped from attacking the validity of such judgment in a suit against them by the assignee thereof, to enforce its payment out of unpaid stock subscriptions, as such judgment is prima facie fraudulent and its validity must be proved whenever it is relied upon: *Saylor v. Commonwealth Banking Co.*, 38 Or. 204, 62 Pac. 652.

II. Judgment When not Conclusive.

a. **Fraud, Mistake, or Want of Jurisdiction.**—As before shown, the cases all admit that a judgment against a corporation is not conclusive against a stockholder as to his liability for its debts when such judgment is open to attack by him on the ground that it was obtained by fraud or collusion or in a court not having jurisdiction. In the following cases the defense of fraud in procuring the judgment was successfully interposed as a defense by the stockholder in a secondary suit against him: *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875; *Choate v. Boyd*, 59 Kan. 682, 54 Pac. 1042; *Whitman v. Cox*, 26 Me. 335; *Town of Hinckley v. Kettle River R. R. Co.*, 80 Minn. 32, 82 N. W. 1088; *Lawyer v. Rosebrook*, 48 Hun, 453, 1 N. Y. Supp. 594. In the absence of fraud or mistake in obtaining a judgment against a corporation, such judgment is conclusive upon the stockholders, but otherwise if fraud or mistake is alleged, which defense belongs to stockholders and upon delinquent subscriptions, and not to the corporation alone, and may be set up by cross-bill to a creditor's bill upon the judgment: *Wilson v. Kiesel*, 9 Utah, 397, 35 Pac. 488. In *Warrington v. Ball*, 90 Fed. 464, the rule was laid down that fraud being an available defense at law, a stockholder sued upon a judgment against the corporation, to which he was not a party, may allege fraud

in the procuring of such judgment as a defense and is not required to bring a suit in equity to set it aside. Such defense is no more a collateral attack upon the judgment than a suit in equity would be.

In such case the stockholder must clearly allege, and the burden of proof is on him to show such fraud as a defense: *Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613; *Belmont v. Coleman*, 1 Bost. 188. To impeach such judgment sued on for fraud and collusion, if fair and regular on its face, the burden rests on the defendant to prove his allegations by evidence that is clear and precise and such proof must establish fraud on the part of both plaintiff and defendant in such judgment: *American Nat. Bank v. Supplee*, 115 Fed. 657. The fact that the judgment was obtained in a court having no jurisdiction is a defense for the stockholder: *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875; *Choate v. Boyd*, 59 Kan. 682, 54 Pac. 1042.

b. **Special Defenses.**—If a judgment is rendered against a corporation by default on a contract which the corporation had no power to make, a stockholder, when sued to enforce his statutory liability, may insist as a defense on the invalidity of such contract: *Ward v. Joslin*, 105 Fed. 224; affirmed, 186 U. S. 142, 22 Sup. Ct. Rep. 807. Some courts have gone so far as to hold that in respect to rights arising out of contracts other than subscriptions for stock, a shareholder is not bound by a judgment against a corporation to which he was not a party: *Andrews v. National Foundry etc. Works*, 76 Fed. 166. A stockholder of a corporation who is not made a party to proceedings in insolvency against it is not bound by a decree in such proceedings in respect to any question of his individual liability, involving his special holding of stock: *Rood v. Whorton*, 67 Fed. 434. If a corporation has gone into liquidation, a judgment in an action subsequently commenced against it, is not conclusive upon its stockholders: *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 10 Sup. Ct. Rep. 238. The same rule prevails if the corporation has been dissolved before judgment against it: *Bonaffe v. Fowler*, 7 Paige, 576.

If, under the charter of a corporation, its stockholders are liable to the extent of the par value of their shares for all debts that are to be paid within a certain time from the time when contracted, if sued against the corporation within a certain time after maturity, a judgment against the corporation does not prevent the stockholder, when subsequently sued under the charter, from interposing a defense on his liability for the original debt: *Union Bank v. Wando etc. Co.*, 17 S. C. 339.

A judgment against a corporation while a party is a stockholder, upon a contract entered into before he became such stockholder, is not conclusive of his liability for corporate debts contracted while he is a stockholder: *Larrabee v. Baldwin*, 35 Cal. 155; *Bohn v. Brown*, 83 Mich. 257. If a statute makes all shareholders liable for all

corporate debts except loans, the shareholder may, after judgment against the corporation, contest his liability upon the ground that the debt recovered upon was for money loaned: *Wilson v. Pittsburgh etc. Coal Co.*, 43 Pa. St. 424.

III. New York Rule.

The courts of the state of New York have never adopted the rule prevailing elsewhere that a judgment by a court of competent jurisdiction against a corporation may be conclusive against a stockholder as to his individual liability or as to his liability on unpaid stock subscriptions.

The greatest extent to which the courts of that state have gone is to hold that such a judgment is *prima facie* evidence of the liability of the stockholder, while in some cases it has been held that the judgment against the corporation is not even *prima facie* or any evidence of the liability of the shareholder. This is the holding maintained in the case of *Moss v. McCullough*, 5 Hill, 131, laying down the doctrine that in an action brought to charge a stockholder in a corporation, a judgment obtained against his corporation cannot be used either as conclusive or even *prima facie* evidence of the genuineness or validity of the debt. The latest holding to this effect is the case of *Miller v. White*, 50 N. Y. 137.

The prevailing rule in New York, however, seems to be that a judgment previously recovered against a corporation upon the same demand for which suit is instituted against the stockholder is *prima facie* evidence of debt against him, but is subject to be impeached for fraud and collusion, or for mistake, and that the burden of proof is upon the party seeking to impeach it upon such ground: *Belmont v. Coleman*, 21 N. Y. 96; *Hastings v. Drew*, 76 N. Y. 9; *Stephens v. Fox*, 83 N. Y. 313; *Moss v. McCullough*, 7 Barb. 279; *Hoagland v. Bell*, 36 Barb. 57; *Conklin v. Furman*, 8 Abb. Pr., N. S., 161; *Squires v. Brown*, 22 How. Pr. 35; *Belmont v. Coleman*, 1 Bost. 188; *Lawyer v. Rosebrook*, 48 Hun, 453, 1 N. Y. Supp. 594.

In the comparatively late case of *Hastings v. Drew*, 76 N. Y. 15, the court said that "It is insisted that the judgment recovered against the corporation is not evidence against the defendants. The action was in the nature of a creditor's bill to reach the property of the corporation which was in the possession of the defendants and liable for its debts. It being final and conclusive against the corporation, who appeared and defended and now sought to be enforced against the corporate property, it follows that it is conclusive against the trustees and stockholders, provided they received and appropriated the property for their own use in accordance with the findings. The authorities cited by the defendant's counsel in reference to this branch of the case do not sustain the doctrine that the judgment is not evidence: *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 N. Y. 155. In each of the cases cited the action was brought to

enforce a liability under a statute highly penal in its nature, and the rule in such cases has no application here. No reason exists why, in a case of this nature, where the action is brought to reach property of the corporation, which was subject to the lien of the judgment of the plaintiff, and to apply the same to its payment and satisfaction, the judgment should not at least be regarded as *prima facie* evidence."

The latest expression of the court of appeals is as follows: "The cases of *Miller v. White*, 50 N. Y. 137, and *McMahon v. Macy*, 51 N. Y. 155, depend upon an entirely different principle. In those cases the defendant was not pursued as a debtor of the corporation, or for any pre-existing liability of his own, but upon an original liability created by statute, and it was not in the power of the corporation to admit away his case or suffer a recovery which would be binding upon him and create, as against him, a liability to which he was not previously subject. The present case depends upon the same principle as *Hastings v. Drew*, 76 N. Y. 9, and other cases of actions by creditors against the debtors of their debtors, or for the recovery of the assets of such debtor. In all such cases a judgment recovered by the plaintiff against his debtor is evidence of the right of the plaintiff to pursue the debtor or assets of the judgment debtor": *Stephens v. Cox*, 83 N. Y. 317. Hence it was held that the record of a judgment against a corporation is competent evidence of plaintiff's status as a creditor and of the amount due him in an action by him to hold a stockholder in such corporation liable for its debts to the amount unpaid on his stock: *Stephens v. Fox*, 83 N. Y. 313.

Whether the supreme court of Michigan, by its decision in the principal case, intended to adopt the New York rule, we are unable to say. In truth, we must admit that the views of the court are so hazily expressed that we are unable to see them clearly. In the first place, it is said in the opinion that judgments against corporations are not conclusive upon stockholders, where they were rendered through fraud or collusion or without jurisdiction. This may be conceded to be true, but the court does not assert, nor do we know of, anything to support such assertion, if made, that the judgment in question was rendered either through fraud or collusion or without jurisdiction. The court cites with apparent approval the case of *Slee v. Bloom*, 20 Johns. 669, and another New York case, and also the case of *Saylor v. Banking Company*, 38 Or. 204, 62 Pac. 652, in spirit, in harmony with the New York decisions. In our judgment, all these decisions, as well as that in the principal case, are entirely indefensible and the only rule sustainable either upon principle or authority is that hereinbefore stated in subdivision I.

CITY OF GRAND RAPIDS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[150 Mich. 238, 89 N. W. 932.]

CONSTITUTIONAL LAW—Taxation—Retroactive Statute.—

A statute attempting to create a personal liability to pay assessments previously made on land, where no liability existed when the assessments were made, is unconstitutional and void. (p. 476.)

L. K. Salsbury, for the plaintiff.

Fitz Gerald & Barry and F. A. Stace, for the defendant.

²³⁸ LONG, J. Plaintiff brought this action of assumpsit against the defendant railway company, claiming that it was personally liable for the payment of several special improvement assessments made at different times in the years 1892, 1893, and 1894. The declaration contains five counts, on five alleged separate, independent causes of action, arising out of five different special improvements. Plaintiff subsequently abandoned its claim under the fourth count. On the trial the court below took the case from the jury, and directed a verdict for the plaintiff on ²³⁹ the first count for the sum of twelve hundred and seventy-seven dollars and ninety cents—being the amount claimed for the assessment for the pavement of West Bridge street, with interest from the date of the assessment—but held the assessments for the improvements referred to in the remaining counts illegal and void. Both parties have appealed.

It appears that, at the time when the assessment for the improvement of West Bridge street was made, there was no provision in the city charter that such assessment should be a personal demand against the owner or occupant of the property assessed, the only method provided for enforcing collection being a sale of the property assessed. The mayor's warrant did not direct or authorize any proceedings by distress or suit or otherwise for the collection thereof. The assessment was made a lien on the land, and, if not paid voluntarily, the treasurer could do no more than to so certify in his return. This condition of the law was recognized by this court in the case of Lake Shore etc. Ry. Co. v. City of Grand Rapids, 102 Mich. 374, 60 N. W. 767, in which case the city was enjoined from selling this same land for this same assessment. In this case, after reciting the provisions of the charter as to the sale of

the land, the court said: "At the time of this assessment, no other means were provided by the charter for the collection of such assessments." In 1893 section 10 of title 6 was amended by a provision that the mayor's warrant should contain a clause "commanding and authorizing said treasurer, when he may deem it necessary so to do, to levy and collect the same by distress and sale of any personal property upon such premises belonging to the premises chargeable to said assessment": Act No. 418, Local Acts 1893. Of this provision this court remarked in the above case: "Just what this provision means is difficult of ascertainment."

After the decision by this court of the above-mentioned case, the city sought and obtained further legislation in relation to special assessments and at the next session of ²⁴⁰ the legislature, in 1895, the said section 10 was again amended, so that no lien should attach to the roadbed, right of way, or other premises of any duly incorporated railroad corporation which are necessarily used in operating its corporate franchises, and the city treasurer was authorized, "when he may deem it necessary so to do, to levy and collect the same by distress and sale of any personal property belonging to the person, corporation, or company against whom such assessment or tax is made, and found within the corporate limits of the city of Grand Rapids, in like manner as general state, county, and municipal taxes are collected out of personal property within the corporate limits of said city": Act No. 444, Local Acts 1895. The city also procured the passage of the following act, which was approved on the same day as the amendment to section 10 as above indicated; such act being entitled:

"An act to provide for the collection of certain assessments on premises belonging to the Chicago and West Michigan Railway Company, the Detroit, Lansing and Northern Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Grand Rapids and Indiana Railroad Company, the Michigan Central Railroad Company, and the Detroit, Grand Haven and Milwaukee Railway Company, for public improvements in the city of Grand Rapids.

"Section 1. The People of the State of Michigan enact, that the freight-houses, roadbeds, rights of way, and other premises of the Chicago and West Michigan Railway Company, the Detroit, Lansing and Northern Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Grand Rapids and Indiana Railroad Company, the Michigan Central

Railroad Company, and the Detroit, Grand Haven and Milwaukee Railway Company, within the corporate limits of the said city of Grand Rapids, which are necessarily used in operating their respective franchises, are liable for all valid unpaid special assessments for public improvements heretofore made within said city of Grand Rapids, and legally assessed against the same, but that no lien shall attach thereto on account of such assessments, and that the payment of such assessments shall not be enforced and collected out of the same.

²⁴¹ "Sec. 2. All such assessments which are valid, and all installments thereof, together with all interest and charges thereon, and all costs and charges for enforcing and collecting the same, are hereby declared legal demands against said respective railroad or railway corporations against whose premises said assessments were made, in favor of said city of Grand Rapids, and may be enforced by said city against said railroad or railway corporations in an action of assumpsit or other proper legal action, and collected out of any property of said respective railroad or railway corporations which is liable to levy and sale upon execution.

"Sec. 3. If, after the passage and taking effect of this act, any such assessment, or any installment thereof, is or shall thereafter become due and payable, and the same is not paid and discharged by the railroad or railway corporation against which the same is a legal demand, the said city of Grand Rapids is hereby authorized and empowered immediately to enforce and collect the same, together with all interest and charges thereon, and all costs and charges for collecting the same, in any manner provided for in this act": Act No. 443, Local Acts 1895.

The plaintiff brings this action, claiming the right to recover under the above act of May 27, 1895, and on the trial in the court below was permitted, by the direction of the court, to recover under said act. The defendant claims that, if plaintiff can recover at all, it must be under that act; but it is contended that the act is unconstitutional, as being repugnant to the constitution of the United States and of this state, because: 1. It attempts to create a personal liability to pay assessments previously made, where such liability did not exist when the assessments were made; 2. It attempts to create a personal liability to pay special assessments for local public improvements; 3. It attempts to create a personal liability to pay an assessment without an opportunity to be heard thereon; 4. The act

affects only certain specified railroad companies, and does not apply to all persons in like manner assessed; 5. It has more than one object, and its object is not expressed in its title.

²⁴² It is further contended by counsel for defendant that, even if the act be valid, it does not apply to the assessment in this case, because such assessment is not shown to have been a valid assessment upon premises belonging to defendant; that the assessment itself was illegal and void, because not made in proportion to the benefits to the land; that the proofs of the assessment and of the lease to the defendant were inadmissible in evidence under the issue joined in the case; and that the plaintiff has no cause of action under the facts in the case.

If any action can be maintained, it must be under the statute above quoted. Assessments upon land cannot be made personal claims, in the absence of statutory provision. In the case of *Lake Shore etc. Ry. Co. v. City of Grand Rapids*, 102 Mich. 374, 60 N. W. 767, this rule was recognized. It appeared in that case that the city charter, as it at that time existed, made no provision to enforce the collection of the tax except by a sale of the land. Under it the railroad was not made personally liable for the tax. In *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553, it was expressly held that a drain tax could not be collected as a personal tax against the owner, the only provision in the statute being that, if not collected, the land should be returned. The only question for consideration in the present case, therefore, is whether the act of May 27, 1895, which purports to give a right of action (Act No. 443), is valid. The act attempts to create a personal liability to pay assessments previously made, where no liability existed when the assessments were made. It declares that certain assessments theretofore made, and which prior to its passage had been mere charges upon the land, shall be legal demands against certain specified corporations; or, in the words of the act: "All such assessments which are valid, and all installments thereof, together with all interest and charges thereon, and all costs and charges for enforcing and collecting the same, are hereby declared legal demands ²⁴³ against said respective railroad or railway corporations against whose premises said assessments were made, in favor of said city of Grand Rapids, and may be enforced by said city against said railroad or railway corporations in an action of assumpsit or other proper legal action, and collected out of any property of said respective railroad or railway corporations which is liable to levy and sale upon execution."

In *Hart v. Henderson*, 17 Mich. 218, it was said by Chief Justice Cooley: "Nothing is a tax simply because of being called so; but any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked declaration of the legislature that it shall constitute a demand against him is unconstitutional and void, as not being 'according to the law of the land,' but, on the other hand, wholly unwarranted by legal principles."

The only basis for the action in the present case is the declaration of the legislature that these assessments shall constitute a legal demand against said corporations. In the case of *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553, it appeared that certain land of the plaintiff had been assessed in 1884 for the construction of a drain under the drain law then in force: Act No. 269, Public Acts 1881. That act, like the charter of Grand Rapids prior to 1895, did not make such assessment a personal charge on the owner, but declared it to constitute a lien on the land, and provided for a sale of the land in case of nonpayment. It was said by the court in that case: "Under this law the property of the then owner of the land could not have been seized and sold to satisfy the tax. If not paid, the only thing the collector could do was to return the lands. The tax was one levied upon the land, and not against the owner. This is further shown by the fact that, in the law of 1885, these taxes were expressly made a personal claim against the owner, and provision made for their collection as against him, the same as other taxes are collected: Act No. 227, Pub. Acts 1885. This is an indication that the legislature construed the act of 1881 as deficient in this respect. It was also provided in ²⁴⁴ the act of 1885 that all drain taxes 'properly returned to the county treasurer,' and remaining unpaid, 'may be ordered charged back by the board of supervisors, and reassessed upon such lands, in the same manner that unpaid or rejected taxes may be charged back by the auditor general, and reassessed, under the general provisions of law.' When this tax was originally assessed, in 1884, under the law of 1881, as before said, it could not have been made a personal claim against the owner of the land. It was never levied against him, but against the land. The law of 1885 undertakes to make these taxes a personal claim against the owner of the land. This act could not have the retrospective action contemplated by the act. Taxes levied after the act went into effect may properly be made a personal claim, but the rejected

taxes of 1884, reassessed under the act of 1885, cannot, in our opinion, be made a personal claim against the owner of the land."

We think the above case is controlling of the present, and that no other of defendant's contentions need be considered.

The order of the court below holding the act valid, and entering judgment for the plaintiff, must be reversed. No new trial will be ordered. It follows that the appeal of the city in reference to the other taxes cannot be sustained, and as to those the judgment must be affirmed.

Hooker, C. J., Moore and Montgomery, JJ., concurred with Long, J.

HOOKER, C. J., concurring. This action is a second attempt through legal proceedings to collect an assessment made for local improvements upon the property of the defendant. The first failed for the reason that the legislature had failed to provide a method of enforcing payment by proceedings against the land assessed. In dismissing the bill in that case, we held that the local assessment was valid, and we were careful not to hold that the claim of the city for the assessment was not a valid and subsisting obligation, if not a lien upon the land. Subsequently the legislature attempted to make this a personal debt due from the defendant to the city, and incidentally provided ²⁴⁵ that the land assessed should be discharged of any lien therefor. I concur with Mr. Justice Long in holding that this act cannot be given a retroactive effect, and therefore that it has no application, in any of its provisions, to this cause. The judgment must therefore be reversed, and no new trial ordered; but it should be understood that the lien of the city for its taxes, if it ever had any, is unaffected by the legislation mentioned, or by these proceedings.

Moore and Montgomery, JJ., concurred with Hooker, C. J.

Grant, J., did not sit.

Retrospective Statutes are considered in the monographic note to *Goshen v. Stonington*, 10 Am. Dec. 131-140. Vested rights cannot be disturbed by retroactive legislation: *Gladney v. Sydor*, 172 Mo. 318, 95 Am. St. Rep. 517, 72 S. W. 554; but over mere remedial procedure the power of the legislature is absolute, and laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein: *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376. It has been held that a statute operating retrospectively

to give a mechanic a lien for work already done affects the remedy only and is constitutional: *Bolton v. Johns*, 5 Pa. St. 145, 47 Am. Dec. 404.

Personal Liability for Taxes and assessments is discussed in the monographic note to *Richards v. Commissioners of Clay County*, 42 Am. St. Rep. 655-661, and in the subsequent cases of *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362; *Hanson County v. Gray*, 12 S. Dak. 124, 76 Am. St. Rep. 591, 80 N. W. 175.

CROUSE v. MICHELL.

[130 Mich. 347, 90 N. W. 32.]

LANDLORD AND TENANT—Assignment of Lease—Collateral Security.—A covenant not to assign a lease without the consent of the landlord is not broken by an assignment of the lease as security for a debt. (p. 484.)

LEASE FOR YEARS—Assignment—Recording.—A lease for more than three years is a conveyance of such an interest in lands as to make real estate recording laws applicable to an assignment of such lease as security for a debt. (p. 487.)

LEASE—Assignments of—Priority.—As between two unrecorded assignments of the same lease, the one first executed has priority. (p. 488.)

Stevenson & Butzel, for the complainants.

Walker & Spaulding, for the appellants.

348 MOORE, J. This is a bill filed by the assignees of a lease to have it sold in satisfaction of the lessee's indebtedness to them secured by the assignment. The circuit judge granted a decree according to the prayer of the bill of complaint. The case is brought here by appeal.

The terms of the lease as to assignments and transfers of the lessee's interest without the consent of the lessor will be referred to later. The complainants' assignment was not consented to by the lessor. The main question in the case is on the validity of this transfer, without consent, against a subsequent transfer, made with the lessor's consent. The defendants are the personal representative of Mr. Parker, the lessor; Mr. Michell, the lessee; the members of the firm of A. Ives & Sons, bankers, to whom the assignment with consent was made by Mr. Michell; Mr. Harmon, the trustee in bankruptcy of Ives & Sons; and the Macdonald Clothing Company, who hold from Ives & Sons a sublease for substantially the unexpired term of the lease. The lease is of a store building at the cor-

ner of State street and Woodward avenue, Detroit, and was made by Mr. Parker, party of the first part, to Mr. Michell, party of the second part, for a term of fifteen years, commencing February 1, 1895. The material provisions of the lease are as follows: "That all understandings or agreements made between the said above parties are to be void unless in writing; that the party of the second part will not assign nor transfer this lease, or sublet said premises, or any part thereof, without the written consent of said party of the first part." In an earlier part of the lease it is "provided that, in case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, his certain attorney, heirs, representatives, and assigns, to re-enter and repossess the said premises, and the said party of the second part, and each and every other occupant, to remove and put out."

On August 2, 1897, Mr. Michell, who was engaged in both the clothing and grocery business, organized a corporation to ³⁴⁹ conduct the clothing business, under the name of the C. H. Michell Company, in which he held nearly all the stock. This company carried on this business in the premises covered by the lease from its organization until October, 1899, when it suspended business, and its stock was sold out and removed. Mr. Michell also organized a corporation under the name of the Michell Table Supply Company, to carry on the grocery business, in which he held nearly all the stock. This company occupied a portion of the premises in question from October, 1897, until shortly before the building was sublet by the defendants Ives to the Macdonald Clothing Company, in March, 1900. There was no written agreement between Michell and either of these corporations regarding their occupation of the Parker premises, except it was understood at the time of the organization of the clothing company that it was to occupy and stay in that store. During the business existence of the clothing company, the rent of the premises was paid to Parker by its checks. Mr. Parker receipted for this rent in each case to Mr. Michell individually. He knew that the two corporations were in occupancy. It does not appear that he knew anything of the terms on which they occupied. He also knew that large sums of money were expended by these two companies to fit the premises for their business.

The complainants sold large quantities of merchandise to C. H. Michell and to the C. H. Michell Company. On the 2d

of August, 1897, Michell, or the C. H. Michell Company, was indebted to the complainants in the sum of \$20,000, or thereabouts, and the Michell interests desired to make arrangements for an extension of time for the payment of the \$20,000 for three years, and also to provide for the purchase on credit of additional goods from the complainants, and to secure them the payment of the debt then due, and also to secure them the payment of such future indebtedness as should accrue from time to time by the further sale of goods to the C. H. Michell Company. On the second day of August, 1897, C. H. Michell³⁵⁰ delivered to the complainants, through Elliott G. Stevenson, a power of attorney. It provided that Stevenson could and should execute an assignment of the lease in question to Crouse & Brandegee whenever desired by them, "as security for the payment of any indebtedness owing by the said Carl H. Michell or the said C. H. Michell Company to said Crouse & Brandegee," and Stevenson was given all the power and authority that Michell had himself in the premises. The power conferred upon Stevenson, to use the language of the assignment itself, "is conferred for the purpose of authorizing and empowering him to execute an assignment of the lease, . . . together with all rights and interests of the said Michell under the same, to be held and used by the said Crouse & Brandegee as security for the payment of any sum of money that said C. H. Michell shall owe to the said Crouse & Brandegee." On the same day the original lease was delivered by Michell to the complainants herein, through their attorney and agent, Elliott G. Stevenson, and this original lease, from that day to this, has never been out of the control and possession of the complainants.

In March, 1898, Mr. Stevenson, under this power of attorney, assigned and conveyed to the complainants the lease, and all Michell's rights and privileges thereunder, to secure the indebtedness contemplated by the power of attorney. This was not recorded, nor was it filed as a chattel mortgage. On October 10, 1898, Mr. Stevenson notified Mr. Michell of the assignment. On October 16, 1899, after the rights claimed by and under Ives & Sons in the lease had accrued, if they had any thereunder, and their assignment had been delivered to them, and they had taken possession under it, Mr. Stevenson gave written notice to Mr. Parker and to Ives & Sons that an assignment of the lease had been made by Michell to the complainants in March, 1898. On October 27, 1899, Mr. Parker, by letter,

replied to Mr. Stevenson's notice, saying that he had no previous knowledge of the transfer to Crouse & Brandegee; that, under the terms of the lease, ³⁵¹ it could not be assigned without his written consent; that he had not consented to this assignment; and, further, "I do not now consent to it, and will in no way recognize it." It is not claimed that Mr. Parker had any previous notice or knowledge of the complainants' interests.

The defendants Ives & Sons were the bankers for the table supply company from its organization, and loaned it money from time to time. On August 9, 1899, this indebtedness amounted to \$46,201.77, represented by five interest-bearing demand notes, indorsed by C. H. Michell, aggregating \$20,000, and by an overdraft for the remainder made up of advances previously made from time to time. None of this indebtedness was contracted before December, 1898. On August 7, 1899, Mr. Don M. Dickinson, who was counsel for the table supply company, after examining statements of their condition, which they furnished, and at their request, asked Ives & Sons to make them further advances, representing that this would, in his judgment, enable the company to pull through, and that the Parker lease, which the Iveses knew to be valuable, would be assigned to secure the existing debt and future advances. To this proposition Ives & Sons agreed, and upon the strength of it forebore on the existing debt, and made further advances from time to time, the amount on October 14, 1899, being \$6,416.01. On September 23d, in pursuance of this verbal understanding, a written permission was obtained from Mr. Parker, allowing Mr. Michell to sublet the premises for the unexpired period of the lease to Ives & Sons, and allowing Ives & Sons to sublet them to "such person or persons, firm, or corporation as they may elect; said premises to be occupied, however, by said Ives & Sons or their subtenants subject to and in accordance with all the requirements" of the original lease. It further stated that it should not be construed as a general waiver of the provisions of the lease relating to assignment and subletting, but to give permission to sublet only to the persons and in the manner in the permission provided.

³⁵² On October 11, 1899, Mr. Michell executed to Ives & Sons an assignment of all his right, title and interest in the lease to secure the advances made in pursuance of the agreement of August 9th with Mr. Dickinson, and all notes indorsed by him and discounted by Ives & Sons for the benefit of the table sup-

ply company, and such further advances as might be thereafter made. This assignment and Mr. Parker's assent were delivered to Ives & Sons on October 14th. On October 16th they took possession of the leased premises, suffering the table supply company to continue therein until shortly before the transfer to the Macdonald Clothing Company. It is claimed that up to this time Ives & Sons had no notice of the transfer to the complainants, or that they had any claim on the lease. On the day following their taking possession they received notice from Mr. Stevenson, as already stated. At the time when Ives & Sons took possession there was some rent in arrears to Parker. This, under the terms of his consent, it was necessary for them to pay. They paid it, and further rent accruing up to the time of the transfer to the Macdonald Clothing Company; in all, \$7,850.73. In March, 1900, Ives & Sons sublet the premises to the Macdonald Clothing Company for substantially the remaining term of the lease, the clothing company paying therefor the sum of \$31,700, and undertaking to carry out the lessee's obligations under the lease and the conditions of the Parker consent.

It is claimed by complainants that the value of the lease over and above the rental it called for was \$38,497.76. The defendants claim this amount is simply the present worth of the difference between the rental named in the lease and the rental offered by Mr. Stevenson, payable in monthly installments, for the unexpired term of the lease, on a five per cent basis; and that the amount realized from the lease by Ives & Sons, after deducting the amount of the rent which they had paid, was \$23,849.27, which was \$2,566.74 less than the amount of their demand paper, plus the advances between August 9th and October 14th.

353 The complainants claim: That the pledge or assignment of the lease as security in good faith was not in violation of the covenant not to assign or sublet. That, even if the pledge were a violation of the covenant, Mr. Parker has waived the same by his conduct after knowledge of the breach on the part of Michell. That, as between complainants and the Iveses, the complainants are entitled to priority, because their assignment was first in point of time, and neither of the conveyances has ever been recorded; because the Iveses were informed of the prior assignment to these complainants; because the Iveses did not change their position any between the time of getting the actual assignment of the lease, on October 14th, and the re-

ceipt of written notice of the complainants' assignment, on October 17th; because an oral pledge of a leasehold interest of fifteen years' duration is, under statute in this state, void, and no rights can be acquired as against a prior assignee of such leasehold interest by one who relies upon a verbal assurance of future assignment.

The defendants contend that the assignment to complainants is invalid as a violation of the terms of the lease, and cannot be enforced; that there has been no waiver of the provisions of the lease by the lessor; that the covenant of the lease against assignments and transfers without the lessor's consent is a continuing covenant, and that a court of equity will not enforce an assignment made without consent in violation of the covenant; that the Ives assignment was taken without notice of complainants' claim, and for value; that as the complainants' assignment, being security upon a chattel real, was not filed as a chattel mortgage, it must, even if otherwise valid, be postponed to the Ives assignment.

The first question demanding attention is whether the assignment or pledge of the lease in question as security in good faith was a violation of the clause against assignment. The case of *Riggs v. Pursell*, 66 N. Y. 199, is in point. The following language is contained in the opinion:

354 "The lease contained a covenant on the part of the lessee that he would not, during the term, assign, transfer, or set over the lease, or any of the term thereby created; and the purchasers claim that this covenant was violated, and the lease forfeited, by the giving of the mortgage, which was foreclosed. Their objection is based upon the giving of the mortgage; not that there was a forfeiture by the sale under the mortgage. . . . The giving of the mortgage was not a violation of the covenant. A mortgage, in this state, of land is not a transfer of the legal title or the possession, but a mere security. . . . It has been held in several cases in England that such a covenant is not violated by a delivery of the lease as a security for money loaned, and yet such a delivery operates as an equitable mortgage of the term created by the lease: 1 *Taylor on Landlord and Tenant*, 2d ed., sec. 406; 2 *Platt on Leases*, 258; *Pitt v. Hogg*, 4 Dowl. & R. 226; *Goodbehere v. Bevan*, 3 Maule & S. 353. In *Pitt v. Hogg*, 4 Dowl. & R. 226, there was a covenant 'not to let, set, assign, transfer, set over, or otherwise part with the premises demised in the lease' of a coffee-house. The

lessee deposited the lease with a brewer as security for beer supplied to the house, and it was held that the covenant was not violated. Abbott, C. J., said: 'I am clearly of opinion that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord, without his consent in writing.' In *Goodbehere v. Bevan*, 3 Maule & S. 353, there was a similar covenant, and the lessee deposited his lease as a security for money borrowed, and became bankrupt, and the lease was sold under the direction of the chancellor to pay that debt, and it was held that the lease was not forfeited. It is therefore clear that this lease was not forfeited by the giving of the mortgage, which did not transfer the title to the premises or the lease. Neither was it forfeited by the sale under the decree. This was a judicial sale in a hostile proceeding, a sale in invitum, and such sales are held not to violate this covenant. An assignment, either by the lessee or his executor, which is not voluntary, but caused by operation of law, is not a breach of the covenant not to assign. Where a lessee who had so covenanted gave a warrant of attorney to confess a judgment, on which the lease was taken in execution and sold, it was considered no breach of the covenant, all the proceedings being in ³⁵⁵ good faith: *Mitchinson v. Carter*, 8 Term Rep. 57. See, also, *Jackson v. Corliss*, 7 Johns. 531; *Jackson v. Silvernail*, 15 Johns. 278; *Smith v. Putnam*, 3 Pick. 221. Such covenants are restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them: *Church v. Brown*, 15 Ves. 265; *Crusoe v. Bugby*, 2 W. Black. 766; 1 Taylor on Landlord and Tenant, 2d ed., secs. 402, 403; 2 Platt on Leases, 250. This covenant, therefore, furnishes no ground for the relief of the purchasers."

The same question was involved in *Croft v. Lumley*, 6 H. L. Cas. 672. In that case ten different opinions were written, all reaching the same result. We quote from Baron Watson:

"In answer to the second question, I am of opinion that the special case does not disclose any breach of the covenant not to charge or encumber the theater, or any part thereof. The covenant in question is: [His lordship read it.] In order to support this breach, the case states that Lumley granted several warrants of attorney to several persons for debts due and owing from him, and more especially one to Hughes, in the

defeasance to which it was expressed to be a collateral security for a debt, and with a provision that the expense of registering the judgment should be borne by Lumley.

"The nature and effect of a warrant of attorney are well known. Warrants of attorney are generally given where the party, having no defense to an action for debt, authorizes an attorney to confess judgment in order to save expense. The warrant of attorney is no charge on the land. The judgment signed in pursuance of the warrant of attorney may affect a leasehold interest like this in two ways: First, by means of an execution, by which the lease might be taken and sold under a writ of fieri facias; and, secondly, by registering the judgment in the proper office, and, when registered, the judgment would become an equitable charge under Statutes 1 & 2 Victoria, chapter 110, section 13; and by registering a memorial thereof at the Middlesex registry the judgment would obtain priority over any charges or judgments subsequently registered at that registry.

"I think that this covenant applies only to charges and encumbrances directly or immediately made by the lessee, ~~356~~ as the covenant is not that the lessee shall not do any act whereby the lease should be sold or encumbered. It by no means follows that the person for whose benefit the warrant of attorney is given may ever enter up judgment thereon, or, if judgment be entered up, that he may register the same so as to charge the lease. It could not be argued that contracting a debt which the defendant was unable to pay, although that might produce a judgment, and a charge on the lease, could be a charging or encumbering within the meaning of the covenant. Such breach is to be without the will or consent of the lessor; and it could hardly be said that the consent to enter up judgment or register is a consent contemplated by the covenant. I think, therefore, the case as to this breach falls within the principle of *Mitchinson v. Carter*, 8 Term Rep. 57, and that no breach of that covenant has been occasioned by the facts stated in the special case." See, also, 18 American and English Encyclopedia of Law, second edition, page 661.

There are authorities the other way, but we think the weight of authority is as stated in *Riggs v. Pursell*, 66 N. Y. 199. Having reached this conclusion, it is not necessary to discuss the question of waiver. This brings us to the next question: Which of these mortgages has priority? It is claimed by

defendants the question is determined by the rule applicable to chattel mortgages. It is said the leasehold interest is a chattel real (3 Comp. Laws, sec. 8787), and when sold on execution, must be sold as personal estate (Buhl v. Kenyon, 11 Mich. 249, 83 Am. Dec. 738), and can only be seized on execution as a chattel interest (Grover v. Fox, 36 Mich. 459); that, as the assignment was not filed with the city clerk, it is void as to defendants—citing section 9523 of 3 Compiled Laws. On the other hand, it is claimed that, as this lease ran for more than three years, it created an interest in real estate, and brings it under the recording laws applicable to real estate.

The case of Buhl v. Kenyon, 11 Mich. 249, 83 Am. Dec. 738, was decided in 1863. The case of Grover v. Fox, 36 Mich. 459, was decided in 1877. In 1879 an act was passed prescribing the manner of selling leasehold interests in lands on execution: 3 Comp. Laws, secs. 9226-9231. It provides that the manner of levy and notice of ³⁵⁷ sale shall be the same as in case of levy on real estate. It also provides, if sale is made, if the unexpired term of the lease exceeds three years, the same kind of a conveyance shall be executed as in case of a sale of real estate, and also gives a year within which to redeem. Section 9511 of 3 Compiled Laws reads: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing."

Section 8994, chapter 241 of 3 Compiled Laws reads: "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands."

Section 8988 of the same chapter reads as follows: "Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."

Taking all these provisions of law and construing them together, we think it clear that this lease, which had eight or ten years to run, was such a conveyance of an interest in lands as to make the real estate recording laws applicable to it.

As before stated, neither of the assignments has ever been recorded, unless the filing of the *lis pendens* at the time of the commencement of this suit may be regarded as a recording of the assignment. This, then, being the situation, the general rule that, as between two unrecorded conveyances, the one first made has priority, applies. It ³⁵⁸ is stated in 1 Jones on Mortgages, section 607, as follows: "As between several unrecorded mortgages or other conveyances, that of prior execution takes precedence." In 20 American and English Encyclopedia of Law, first edition, page 592, it is said: "With conveyance first recorded: Recordation is required for the protection of subsequent purchasers only. To require a subsequent conveyance of title to be recorded in order that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general design of these statutes, which was to protect purchasers from being undone by prior secret conveyances, by making the means of obtaining information thereof available to that end. And so it is not necessary to his full protection, in the absence of statutory provisions so requiring, that the subsequent purchaser record the instrument under which he claims before the recordation of the conveyance of the prior purchaser. But, although such requirement may not be in full accord with the general design of the recording provisions, from a desire to secure a prompt record of conveyances, and to afford a means for the ready determination of certain questions of priority which would otherwise arise, the protection of the recording acts is limited in most of the states to a purchaser whose deed or conveyance is first duly recorded. This requirement must be complied with in order to support the claim of the subsequent purchaser to the protection afforded by the recording acts"—citing many cases.

The decree of the court below is affirmed, with costs.

Hooker, C. J., Grant and Montgomery, JJ., concurred.

Long, J., did not sit.

The Assignment of Leases is discussed in the monographic note to Washington Nat. Gas Co. v. Johnson, 10 Am. St. Rep. 557-565. and

in the subsequent cases of Springer v. De Wolf, 194 Ill. 218, 88 Am. St. Rep. 155, 62 N. E. 542; Blakeman v. Miller, 156 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120, and cases cited in the cross-reference note thereto.

Collateral Securities are discussed in the monographic note to Griggs v. Day, 32 Am. St. Rep. 711-731.

SCHELLENBERG v. DETROIT HEATING AND LIGHT- ING COMPANY.

[130 Mich. 439, 91 N. W. 47.]

FIXTURES—Estate by Entireties.—Boilers sold to a husband alone, under a contract retaining title in the vendor until paid for, and placed in, and permanently affixed to houses owned by such husband and wife in entirety do not become fixtures and may be replevied by the vendor if not paid for. (p. 490.)

FIXTURES—Unity of Title.—To constitute a fixture there must be annexation to the realty, together with unity of title and ownership of the realty and thing affixed. (p. 491.)

FIXTURES—Intention.—If a boiler is sold to a husband alone, the vendor retaining title until it is paid for, and is placed in a house owned by such husband and his wife by entireties, in such manner that it can be removed without injury to it or the building, this shows an intention that the boiler shall remain personalty and not become a fixture. (p. 491.)

F. L. Ford, for the complainant.

G. W. Bates, for the defendant.

⁴³⁹ LONG, J. The bill in this case was filed to enjoin the execution of a writ of replevin by which it was sought by the defendant to take and remove two steam boilers sold to Harry L. Schellenberg, the husband of complainant, on a title contract, and placed in the basements of two dwelling-houses. These dwelling-houses are owned by Harry ⁴⁴⁰ L. Schellenberg and his wife as by an estate in entirety, as husband and wife. It appears that the husband bought these boilers to put in the buildings for heating purposes, the defendant reserving the title to itself by the contract until the boilers were paid for. Payment being refused, replevin suits were brought for the two boilers against Schellenberg and his wife and the tenants in the buildings. On the trial of the replevin suits, the defendant in the present case had judgment against Schellenberg for the return of the property, the judgment not pass-

ing against the wife or the tenants. It is stated in the present bill that, when these boilers were sold to Harry L. Schellenberg, the defendant knew they were to be attached to the dwellings in a permanent way, and saw the plans of construction of said buildings, and of the heating apparatus to be placed therein; that the complainant believes the defendant will attempt to remove the boilers, and asks that it be enjoined from removing or attempting to remove the same.

The defendant demurred to the bill on the grounds: 1. That it does not show jurisdiction in a court of chancery; 2. That complainant has not by said bill stated a case which entitles her to the relief prayed; 3. That the bill does not show on its face that the complainant has any such interest in the subject matter of the suit as entitles her to file it; 4. That the question as to whether the boilers can be treated as fixtures is a matter not within the jurisdiction of a court of chancery, and whether they can be taken on execution in replevin is a matter which can only be determined in a court at law; 5. That it appears by the bill that the constable is a necessary party, as it appears he was proceeding to take the boilers under process in his hands, and remove them from the buildings; 6. That it does not appear by the bill that the amount in controversy exceeds one hundred dollars.

This demurrer was sustained in the court below, and the bill dismissed. Complainant appeals.

441 We think the court was not in error in sustaining this demurrer. The title of the real estate is in the husband and wife jointly, who hold it by the entirety. The boilers were purchased by the husband, and placed in the buildings, under a contract reserving title to the defendant company. The wife was not a party to this contract, and the boilers never became fixtures in the buildings. There was no unity of title in this property and the real estate. It does not matter that the bill alleges that the boilers became attached and became a part of the real estate. The statements in the bill are sufficient to show that they never attached to the real estate, and never became fixtures.

In *Adams v. Lee*, 31 Mich. 440, the title to the real estate was in one Kaufman. Machinery was put into the building on the real estate. There was no unity of title and ownership of the land and the machinery. Referring to the want of unity of title as affecting the question of fixtures, it was said: "To constitute a fixture, there must not only be physical an-

annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would, of necessity, convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and, as to another undivided interest, be personalty. It must be the one thing or the other."

See, also, upon this question: *Robertson v. Corsett*, 39 Mich. 777; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Lansing Iron etc. Works v. Walker*, 91 Mich. 409, 30 Am. St. Rep. 488, 51 N. W. 1061; ⁴⁴² *Lansing Iron etc. Works v. Wilbur*, 11 Mich. 413, 69 N. W. 667.

It is also quite apparent from the statements in the bill that these boilers put in the basements for heating purposes could be detached from the buildings without material injury to the boilers or the buildings; but, in addition to this, they were sold to the husband, the defendant reserving title to itself. These circumstances show that it was the intention of the parties that the boilers were to remain personalty, and not to become, by annexation, a part of the realty: *Robertson v. Corsett*, 39 Mich. 777. It was said in *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 903: "The permanency of the attachment, and its character in law, do not depend so much upon the degree of physical force with which the thing is attached, or the manner and means of its attachment, as upon the motives and intention of the party in attaching it. If the intention is that the articles attached shall not by annexation become a part of the freehold, as a general rule they will not. The exception is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy; as when the property cannot be removed without practically destroying it, or when it, or part of it, is essential to the support of that to which it is attached."

The bill does not exhibit such a state of affairs.

We think no other questions in this case need be discussed. A judgment for the return of the property has been awarded to the defendant. Simply because the complainant is an owner by the entirety of the real estate would give her no interest in the retention of the property placed thereon which would entitle her to defeat the defendant's possession.

The order sustaining the demurrer must be affirmed, with costs.

The other justices concurred.

What are Fixtures is the subject of a monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696. As to whether boilers are fixtures, see *Cavis v. Beckford*, 62 N. H. 229, 13 Am. St. Rep. 554; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 15 Am. St. Rep. 147, 22 Pac. 184; *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903, 11 S. E. 373; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 573, 24 Pac. 920. To determine the irremovable character of fixtures, the three tests are: 1. Actual annexation to the realty or some appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is put; and 3. The intention of the parties making the annexation to make a permanent annexation to the freehold: *Baker v. McClurg*, 198 Ill. 28, 92 Am. St. Rep. 261, 64 N. E. 701; *Sherrick v. Cotter*, 28 Wash. 25, 92 Am. St. Rep. 821, 68 Pac. 172. The question is primarily one of intention: *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264, 60 N. E. 357. As to whether a chattel retains its character as such when it is sold on condition that the title shall remain in the vendor until paid for, see the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 889; *Thomson v. Smith*, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789.

McGREGOR v. McGREGOR.

[130 Mich. 505, 90 N. W. 284.]

PUBLIC OFFICERS—Agreement Disposing of Salary.—An agreement by a public officer that his salary when earned shall become assets of a partnership of which he is a member is not against public policy as an assignment of an unearned salary by a public officer. (p. 494.)

A. G. Pitts, for the complainant.

G. W. Radford, for the defendant.

508 MONTGOMERY, J. This is an appeal from an accounting between partners. The complainant and defendant are brothers, and succeeded to the business established by John

McGregor, Sr. Both parties appeal from the decree of the court below, and neither contends for a decree in the terms granted by the circuit judge.

Substantially the only controversy between the parties relates to the question of the salary received by complainant while he was acting, for several years, as boiler inspector of the city of Detroit. It is the claim of defendant that both himself and complainant had been devoting their time exclusively to the business of the partnership; that complainant was offered the appointment of boiler inspector; and that, before accepting the appointment, the matter was talked over between the two partners, in the presence of their father, and the conclusion reached that it would be well for complainant to accept the appointment, as the partnership business was somewhat dull, and the firm would have a salary coming in from this office; that, upon this understanding, complainant accepted the office, and held it for several years; that defendant continued to devote his entire time to the business; that complainant from time to time paid in some of the money to the business; that defendant opened an account with the boiler inspector's office on the books, which was credited in 1894, 1895, 1896, and 1897 an aggregate of nineteen hundred and eighty-three dollars. Complainant disputes this claim of defendant, and alleges that there was no understanding or agreement that the salary of the office of boiler inspector was to be deemed a part of the assets of the firm, but avers that the sums paid in by him were in the nature of loans to the company, and should be returned.

⁵⁰⁷ The case is not free from doubt, but we think the preponderance of testimony supports the contention of defendant. Previous to the appointment of complainant as boiler inspector, both parties were drawing fifteen dollars per week from the business for living expenses. It is a significant fact that John continued to draw that amount regularly for nearly four years after he became boiler inspector, although the testimony is very clear that he gave little or no attention to the business.

The complainant further contends that the contract was void as against public policy, as it amounts to an assignment of an unearned salary as a public officer. But it is, rather, an agreement as to the manner in which the salary shall be disposed of when earned and paid. See this distinction taken in *Thurston v. Fairman*, 9 Hun, 584; *Greenhood on Public Policy*, 355.

It is conceded in complainant's brief that if, on an accounting, John McGregor should be charged with the amount of the salary received, the defendant is entitled to the whole sum in the hands of the court, and complainant would also be bound to pay him twelve hundred and fifty-two dollars and eighty-nine cents in cash, and that complainant's interest in certain Windsor property should be subjected to a lien for this amount. As we adopt the view that the evidence preponderates in favor of defendant's contention, the decree below will be modified and put in this form. The defendant will recover the costs of this court.

Hooker, C. J., Moore and Grant, JJ., concurred.

Long, J., did not sit.

The Assignment of the Salary of a public officer to be earned in the future is void: Dickinson v. Johnson, 110 Ky. 236, 96 Am. St. Rep. 434, 61 S. W. 267; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273. On subjecting the salaries of officers to the payment of their debts, see the monographic note to Dickinson v. Johnson, 96 Am. St. Rep. 443-452.

THOMPSON v. UNION TRUST COMPANY.

[130 Mich. 508, 90 N. W. 294.]

BANKS AND BANKING—Insolvency.—Deposits of money in bank, subject to check, become due without demand, if the bank becomes insolvent. (p. 495.)

BANKS AND BANKING—Insolvency—Setoff.—Deposits of money in bank when it becomes insolvent may be set off against the notes of the depositor of the bank not then due. (p. 496.)

R. G. George, for the petitioner.

Bowen, Douglas & Whiting, for the defendant.

508 MOORE, J. The following statement taken from the brief of the counsel for the appellant shows the question involved in this case: "On the tenth day of February, 1902, the City Savings Bank, a Michigan corporation, located in the city of Detroit, was insolvent; and on that day George L. Maltz, commissioner of the banking department of the state of Michigan, closed and took possession of said bank. On that day there were in the possession of said bank two notes made by Frank M. Thompson, the petitioner—one for three thousand

and twenty-one dollars, dated August 12, 1901, due six months after date, and one for nine hundred and ten dollars, dated January 17, 1902, due four months after date. At the time of the failure, Frank M. Thompson had to his credit upon the books of the said bank, on deposit, the sum of two thousand four hundred and fifty-eight dollars and forty-three cents, subject to check. On February 19, 1902, the said Frank M. Thompson ⁵⁰⁰ demanded from the receiver, appellant herein, that said receiver apply upon the above-described notes the deposit due the said Frank M. Thompson, and, upon payment by him of the balance due upon said notes after the deposit had been deducted, surrender to him the notes. This the receiver refused to do, and, from the order directing such setoff, brings this appeal to this court. The legal question can be stated very simply: May petitioner set off the deposit standing to his credit when the bank closed its doors against his notes not then due?"

Counsel for appellant contend that these deposits are not subject to setoff, because not mutual credits; that they are not mutual because, at the time the bank suspended, the debt owing from petitioner to the insolvent bank was not due; that such setoff would affect the rights of other creditors, and would give petitioner a preference over them. They are unable to find any Michigan cases directly in point, but cite several which they think in principle support their position, which will be referred to later.

It is conceded the deposit of Mr. Thompson became due, without demand, when the bank became insolvent: *Colton v. Building etc. Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148. It is also conceded that the receiver stands in the place of the bank, subject to all equities against the bank, and does not sustain the relation of a purchaser of the notes for value, without notice: See *Louis Snyder's Sons Co. v. Armstrong*, 37 Fed. 18; *Van Wagoner v. Gaslight Co.*, 23 N. J. L. 283; *Sherwood v. Bank*, 103 Mich. 109, 61 N. W. 352. It is urged that, if this bank were solvent—a "going bank"—it could not compel Mr. Thompson to pay the notes until maturity, and, on the other hand, he could not compel the bank to accept payment of the notes until they came due; and as the claim of the bank had not matured when the receiver was appointed, though Mr. Thompson's claim did mature when the bank became insolvent, and before the receiver was appointed, it cannot be said the

two claims are in any sense mutual credits, and the subject⁵¹⁰ of setoff. Counsel cite, in support of this proposition, *Gibbons v. Hecox*, 105 Mich. 509, 55 Am. St. Rep. 463, 63 N. W. 519, *Mechanics' Bank v. Stone*, 115 Mich. 648, 74 N. W. 204, and *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74.

An inspection of these cases will show they are distinguishable from the one at bar. In *Gibbons v. Hecox*, 105 Mich. 509; 55 Am. St. Rep. 463, 63 N. W. 519, neither debt was due at the time of the insolvency. In *Mechanics' Bank v. Stone*, 115 Mich. 648, 74 N. W. 204, the debt to the bank was due at the time of its insolvency, while the debt from the bank was not due, and was a contingent liability. It was held the rights of other creditors had intervened, and their equities were superior to those of debtors seeking to set off claims not due. In *Koegel v. Trust Co.*, 117 Mich. 542, 76 N. W. 74, one of the debts did not come into existence until after the appointment of the receiver.

In *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75, Justice McGrath, speaking for the court, said: "There can be no doubt that the certificate of deposit in this case would, in a proper case, be a proper subject of setoff. It is well settled that, in a suit by a receiver of an insolvent bank upon a note or obligation due the bank, the defendant will be allowed to set off his deposit or a certificate of deposit held by him at the time of the suspension of the bank: *Dickson v. Evans*, 6 Term Rep. 57; *Pedder v. Mayor etc. of Preston*, 9 Jur., N. S., 496; *Niagara Bank v. Rosevelt*, 9 Cow. 409; *Ogden v. Cowley*, 2 Johns. 274; *McLaren v. Pennington*, 1 Paige, 112; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *In re Receiver of Middle Dist. Bank*, 1 Paige, 585, 19 Am. Dec. 452; *Smith v. Fox*, 48 N. Y. 674; *New Amsterdam Sav. Bank v. Tartter*, 4 Abb. N. C. 215; *Berry v. Brett*, 6 Bosw. 627; *Jordan v. Sharlock*, 84 Pa. St. 366, 24 Am. Rep. 198; *Farmers' Deposit Nat. Bank v. Penn Bank*, 123 Pa. St. 283, 16 Atl. 761; *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank*, 90 Ky. 225, 13 S. W. 910; *Van Wagoner v. Gaslight Co.*, 23 N. J. L. 283; *Platt v. Bentley*, 11 Am. Law Reg., N. S., 171; *Clarke v. Hawkins*, 5 R. I. 219."

⁵¹¹ The case of *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148, is in point. This was an action by the receiver of the Fidelity Bank against the maker and indorsers of a promissory note which did not mature until after the insolvency of the bank. One of the defendants sought to offset its deposit

with the Fidelity Bank at the time of the failure. This setoff was not allowed in the United States circuit court for the southern district of Ohio. An appeal was taken to the circuit court of appeals, who certified the questions involved to the supreme court. Mr. Chief Justice Fuller delivered the opinion of the court, in which the lower court is reversed and the setoff allowed. We quote from the opinion, as follows:

"The note in controversy did not mature until September, 7, 1887, but the deposit to the credit of the Farmers' Bank was due, for the purposes of suit, upon the closing of the Fidelity Bank, as under such circumstances no demand was necessary. The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.

"The right to assert setoff at law is of statutory creation, but courts of equity, from a very early day, were accustomed to grant relief in that regard independently, as well as in aid of statutes upon the subject. . . . Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and the ordinary rule is that, where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the setoff of the debt due upon the other. . . .

"In the case at bar the credits between the banks were reciprocal, and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied. It was, therefore, the balance upon an adjustment of accounts which was the debt; and the Farmers' Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the ⁵¹² suspension of that bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary."

After quoting the act, it continues: "The provisions of the act are not directed against all liens, securities, pledges, or equities whereby one creditor may obtain a greater payment than another, but against those given or arising after, or in contemplation of, insolvency. Where a setoff is otherwise valid, it is not perceived how its allowance can be considered a preference; and it is clear that it is only the balance, if any, after the

setoff is deducted, which can justly be held to form part of the assets of the insolvent."

Jones v. Piening, 85 Wis. 264, 55 N. W. 413, quotes the case of Oatman v. Batavia Bank, 77 Wis. 505, 20 Am. St. Rep. 136, 46 N. W. 881, which is cited by this court in Mechanics' Bank v. Stone, 115 Mich. 651, 74 N. W. 204, and which is a case similar to the latter, and says: "The case at bar differs widely from that class of cases, and turns upon a different principle. Here it was not the indebtedness of the insolvent debtor that was not due when the assignment was made, but a portion of the indebtedness from the plaintiffs to the assignee of the insolvent debtor. An assignee of such an insolvent debtor has no authority to waive the time of credit secured for the sole benefit of his assignor, and pay a debt not due with credits, or the avails of credits, which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent's estate; but a debtor to such estate, whose debt was not due at the time of the making of such assignment, has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money, or by way of setoff of the amount due him from such estate. This rule is firmly settled in other states."

To the same effect are Smith v. Fox, 48 N. Y. 674; Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726; Smith v. Felton, 48 N. Y. 419; Lindsay v. Jackson, 2 Paige, 581; Colton v. Building etc. Assn., 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23; ~~513~~ Jordan v. Sharlock, 84 Pa. St. 366, 24 Am. Rep. 198; Second Nat. Bank v. Hemingray, 34 Ohio St. 390; Keightley v. Walls, 27 Ind. 387; Smith v. Spengler, 83 Mo. 408; Jones v. Robinson, 26 Barb. 310; In re Van Allen, 37 Barb. 229; Stewart v. Anderson, 1 Cranch, 586; Davis v. Manufacturing Co., 114 N. C. 321, 19 S. E. 371; Adams v. Spokane Drug Co., 57 Fed. 888; Martin v. De Loge, 15 Mont. 343, 39 Pac. 312; Yardley v. Clothier, 2 C. C. A. 349, 51 Fed. 506; Ex parte Prescott, 1 Atk. 230; 1 Morse on Banks and Banking, sec. 338.

As the precise question involved here is a new one in this state, but has been, as we have shown, directly passed upon in the federal courts and many of the state courts, we feel bound to follow those decisions.

Judgment is affirmed.

Hooker, C. J., Grant and Montgomery, JJ., concurred.

Long, J., did not sit.

If a Bank Becomes Insolvent, a depositor may set off his deposit against his notes or other indebtedness to the bank, whether due or not: See the monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 585; *Colton v. Drivers' etc. Loan Assn.*, 90 Md. 86, 78 Am. St. Rep. 431, 45 Atl. 28.

BALEN v. LEWIS.

[130 Mich. 567, 90 N. W. 416.]

MORTGAGES—Release—Discharge—Notice.—A mortgagee by releasing several parcels of land from his mortgage does not discharge therefrom another parcel sold by the mortgagor prior to such release when he has no notice of the sale or that the purchaser thereunder is claiming rights sufficient to put a reasonably prudent man on notice, and the record of such purchaser's deed is not sufficient as constructive notice of such mortgage. (p. 500.)

MORTGAGES—Subsequent Purchase from Mortgagor—Notice. The presence of the mortgagee's agent in the place where the mortgaged premises are located once or twice a year after a purchaser from the mortgagor has gone into possession of such premises, is not sufficient to charge the mortgagee with notice of the purchaser's occupancy. (p. 500.)

MORTGAGES—Application of Rents—Presumption.—If a mortgagor gives a trust deed to the mortgagee's husband for the benefit of the former, authorizing him to sell, apply the proceeds to the expenses of the trust, interest and principal, and reconvey the remainder to the mortgagor, and such trust is accepted upon express agreement that it shall not in any way affect or impair the mortgage, it must be presumed that rents and proceeds of the property thereafter collected by the mortgagor were applied in accordance with the trust. (p. 502.)

U. R. Loranger and S. P. Flynn, for the complainant.

J. Donnelly, for the defendant.

⁵⁶⁸ **HOOKER, C. J.** The complainant, a mortgagee, foreclosed her mortgage, which, when given, covered several distinct parcels of land. Defendant Chateaufneuf had, after the execution of complainant's mortgage, unbeknown to the complainant, purchased, entered upon, and improved one of said parcels, which we may designate as "Lot 8." ⁵⁶⁹ Several of the parcels were released from the mortgage after the sale of lot 8 to Chateaufneuf. Being made a party defendant as a subsequent purchaser, Chateaufneuf answered that lot 8 was discharged from liability, by reason of the release of other parcels primarily liable, and the court so decreed. The complainant has appealed.

Complainant's mortgage was made on October 10, 1881. At

that time there was no building upon lot 8. Defendant Chateaufneuf bought the lot in May, 1882, erected a house, and moved upon the premises in June, 1882, or thereabouts, and has since occupied it as a homestead. He received a deed from Lewis, complainant's mortgagor, in 1887, when he gave a mortgage back to Lewis for one hundred and ninety-two dollars. The evidence shows that the complainant released several parcels of land from the lien of said mortgage after the defendant Chateaufneuf purchased and entered upon lot 8. There is, however, an absence of proof that either the complainant or her agent had actual notice of defendant's rights. It is insisted by defendant's counsel that complainant had constructive notice. The mere fact that defendant's deed was of record is not constructive notice. In order to raise an equity in favor of a purchaser, it must appear, either that the mortgagee, before releasing, had notice of the sale by the mortgagor, or that the purchaser was claiming rights which would put a reasonably prudent man on inquiry. In such case he would be held to notice of facts which the record of the deed would disclose.

The defendant asserts that the circumstances of this case should constitute such notice as would put a prudent man on inquiry, claiming that the complainant's agent was in the city once or twice a year, and must be chargeable with knowledge of defendant's occupancy. We are referred to the case of *Dewey v. Ingersoll*, 42 Mich. 17, 3 N. W. 235, as a case in point, where it was held that the facts should have put the mortgagee upon inquiry. The facts were that the mortgaged premises were upon one of the principal streets of the village where the mortgagee resided, and the purchaser promptly recorded her deed and went ⁵⁷⁰ into actual possession of the premises, made improvements, and resided thereon. There was evidence tending to show that one of the mortgagees had actual notice of these facts, and he, although examined as a witness, did not deny having notice. The present case falls short of this. Actual notice is clearly disproved. Chateaufneuf appears to have been as ignorant of complainant's mortgage interest as she was of his subsequent purchase, although, had he examined the record before purchasing, he would have learned of it; and such examination he was in duty bound to make, while the complainant was under no obligation to search the record for subsequent deeds: *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Cheesebrough v. Millard*, 1 Johns. Ch. 413, 7 Am. Dec. 494; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478;

James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Mich. 476; Woods v. Love, 27 Mich. 309; Hall v. Edwards, 43 Mich. 475, 5 N. W. 652; Sheldon v. Warner, 45 Mich. 640, 8 N. W. 529.

This court said, in the case of James v. Brown, 11 Mich. 25: "While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the other to take care of his own property than on a stranger to take care of it for him. And to make it the duty of the first mortgagee to inquire before he acts, lest he may injure some one, would reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself. To affect the conscience, therefore, of the first mortgagee—for this whole doctrine is one of equity jurisprudence, and not of positive law—it would seem that he should have actual knowledge of the second mortgage. We do not say notice from the second mortgagee is absolutely necessary to enable him to claim the rights of which we have been speaking; but we do think that the existence of the second mortgage should clearly be brought home to the knowledge of the first mortgagee in such a way as to show an intentional disregard by him of the interests of the subsequent mortgagee."

We think, therefore, that the complainant has not impaired her security by her releases.

⁵⁷¹ A trust deed was executed by Lewis, the mortgagor, to complainant's husband, on the thirtieth day of November, 1894, whereby Lewis conveyed to him all of the property remaining in his name; also all leases and executory contracts outstanding. He was authorized to sell the property and apply the proceeds: 1. The expenses of the trust; 2. Taxes; 3. Insurance, if deemed advisable; 4. Interest on complainant's mortgage; 5. The principal of the mortgage; 6. Reconvey remainder to Lewis. This trust was accepted in writing upon the expressed understanding that the same was not in any wise to bind said complainant, or be deemed payment of her mortgage, or in any wise affect or impair the security, rights, or remedies given by said mortgage. It is contended by defendants' counsel that this trust deed was given for the benefit of the complainant, and that it was her duty to collect rents from tenants and amounts outstanding upon executory contracts, and especially a sum secured by mortgage upon lot 8, given by defendant to Lewis, and which sum he is said to have afterward paid to Lewis by reason of his ignorance of the existence of the complainant's mortgage and the trust deed. Lewis

was permitted to collect a portion of the rents, and possibly some amounts due upon contracts.

We are unable to find that anything was paid to Lewis upon the mortgage after the trust deed was made, and, if it could otherwise be claimed that the trust deed operated as an assignment of the mortgage to the complainant's agent, it is not clear that it had not been previously paid to Lewis. Nor is there any proof that Balen ever heard of the mortgage. The record does not warrant us in saying that rents received by Mr. Lewis were not applied in accordance with the trust deed, and we find no evidence showing how much, if any, collected by Lewis was not paid over. Neither does it appear how much, if any, was collected by the family after Lewis' death, nor how much has been uncollected, if any. We must assume that the amount reported due upon the mortgage is correct, and feel constrained to hold that lot 8 should not be discharged from the mortgage. It should be the last parcel to be ⁵⁷² sold, however. The decree will be modified in this particular, and complainant will recover costs of this court against defendant Chateaufneuf.

Moore, Grant, and Montgomery, JJ., concurred.

Long, J., did not sit.

A Partial Release of a Mortgage may be made; and, when made, it affects only the property therein described: *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542. But if a mortgagee releases part of the premises after parts have been sold, having notice of the prior sale, he thereby releases the property first sold, if the property actually released by him is of sufficient value to pay the mortgage debt: *Turner v. Flenniken*, 164 Pa. St. 469, 44 Am. St. Rep. 624, 30 Atl. 486.

Record as Notice.—One holding a mortgage on real property is not affected by subsequently recorded conveyances of parts thereof of which he had no actual notice: *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

PEMBERTON v. DEAN.

[88 Minn. 60, 92 N. W. 478.]

SALES—Warranty.—A manufacturer's printed warranty remaining pasted on an article when sold by a dealer, who has purchased from such manufacturer and sold to a third person without any express representation or warranty does not bind such dealer. (p. 595.)

H. Barton and J. E. Samuelson, for the appellant.

Stringer & Seymour, for the respondents.

⁶¹ **BROWN, J.** Action to recover damages for the breach of a warranty alleged to have been given on the sale by defendants to plaintiff of a certain emery wheel. The court below dismissed the action at the trial, and plaintiff appealed from an order denying a new trial.

⁶² The facts are as follows: At the time stated in the complaint, and for a number of years prior thereto, plaintiff was, and had been, engaged in the business of blacksmithing, in and about which business it was necessary to make use of an emery wheel for the purpose of sharpening tools. On October 1, 1901, he purchased of defendants such a wheel, and removed it to his place of business, and there made use of it. About October 30th of the same year, when engaged in operating the wheel in sharpening tools, the same broke, and a piece therefrom struck plaintiff and severely injured his person. The complaint alleges that defendants represented and warranted, at the time of the sale of the wheel, that the same was well

made, of good material, and capable of making eighteen hundred revolutions per minute; and that plaintiff relied upon such representations and warranty in making the purchase. This action was brought for damages, on the theory that the injury to plaintiff was the direct result of a defect in the wheel, and that defendants were liable as for a breach of the alleged warranty.

The only question we deem necessary to consider is whether the evidence establishes the allegations of the complaint that defendants warranted the wheel at the time of the sale. It was not manufactured by defendants, who were wholesale and retail dealers in heavy hardware, and kept wheels of the kind in stock for sale to the trade; but was manufactured by the Northampton Emery Wheel Company, of Massachusetts, from which company defendants purchased it, with others, in the usual course of trade. A printed card was placed by the manufacturers upon the face of the wheel, which contained the words "Northampton Emery Wheel Co.," the word "Speed," and opposite thereto the figures "1,800," indicating, as claimed by plaintiff, that the wheel was capable of being safely operated at the rate of eighteen hundred revolutions per minute. There were other words upon the card, together with the word "Warranted." This card was upon the wheel at the time it was purchased by plaintiff, and the contention of plaintiff is that the same constituted and amounted to a warranty on the part of defendants in respect to its quality and speed capacity; that, although it may have been placed upon the wheel by the manufacturers, ⁶³ defendants adopted it as their own by making the sale without removing it therefrom.

Conceding that the printed matter upon the face of the wheel was sufficient to constitute a warranty, we are unable to concur in the contention that it was the warranty of defendants. A warranty consists in representations and statements of and concerning the condition and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about. So far as the evidence in the case at bar shows, nothing whatever was said between the plaintiff and defendants concerning the condition or quality of this wheel, whether it was capable of making eighteen hundred revolutions per minute or any other number of revolutions, or as to whether it was fit and suitable for any particular purpose. Attention was not called by either party to the alleged printed warranty, and for aught that appears from the record, the

same was not noticed by either at the time of the sale. Clearly, under such circumstances, the placard cannot be held to be the warranty of defendants, and to hold that they adopted the representations purporting to be thus made would be going far beyond any case to which our attention has been called. Whether the manufacturers would be liable to plaintiff upon this warranty, either upon the ground of neglect in the manufacture of the wheel or for a breach of warranty, is wholly irrelevant to the question. If it be granted that the manufacturers would not be liable, it by no means follows that defendants are. We are clear that the mere sale of the wheel by defendants with the printed matter pasted thereon, without other act or ceremony, did not amount to an express warranty on their part. The allegations of the complaint are not, therefore, sustained by the evidence, and the court correctly dismissed the action. Neither can plaintiff recover upon the theory of an implied warranty. It may be, and doubtless is, true that there is an implied warranty in all cases where an article is manufactured and sold for a specific purpose that such article is fit and suitable for the purposes intended for it. But that rule can have no application to the case at bar, for plaintiff relies in his complaint, not ⁶⁴ upon an implied, but upon an express warranty; and, besides, defendants were not the manufacturers of the wheel.

The order appealed from is affirmed.

Implied Warranties of soundness in sales are discussed in the monographic note to *Emerson v. Bringham*, 6 Am. Dec. 113-119. Ordinarily, no warranty of soundness is implied: *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247, 23 N. E. 718. Compare *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776.

STONE v. BEVANS.

[88 Minn. 127, 92 N. W. 520.]

MUNICIPAL CORPORATIONS—Void Contract.—A contract entered into by the common council of a municipality concerning a municipal matter for the benefit of one of the members of such council is void. (p. 508.)

MUNICIPAL CORPORATIONS—Contract of Officer with Recovery of Payments.—If a void contract is entered into between a municipal council and one of its members under which the latter has received money, it may be recovered for the municipality in a suit by a taxpayer thereof. (p. 508.)

Cliff & Purcell, for the appellant.

R. A. Stone, pro se.

¹²⁷ LOVELY, J. Plaintiff brings this action, as a taxpayer of the village of Morris, for himself and others similarly interested, to recover money wrongfully voted by the village council to one of its members. The cause was tried to the court, who found that the allegations of the complaint were true; also, that the defensive matters set forth in the answer were not established; and as a conclusion of law held that judgment should be entered against defendant Bevans for the amount claimed by plaintiff in behalf of the village. Upon a settled case containing the evidence the defendants moved for a new trial, which was denied. From this order they appeal.

It is provided in the organic act of the village of Morris that its governing body shall be a president and four councilors who ~~was~~ "shall constitute the common council of the village, . . . a majority of whom shall constitute a quorum for the transaction of business": Spec. Laws 1881, c. 30, sec. 4.

Such council is clothed with the usual powers given to the legislative bodies of municipalities in this state, and could incur an indebtedness for a water plant and extension.

Defendant Bevans was president of the council. The other four defendants were the members thereof. In 1891 an extension to the waterworks system of the village was contracted for by the council. New mains were to be laid and bonds issued to pay therefor. The president manifested considerable interest in the matter, and aided in superintending the work. He also visited Dubuque, Iowa, with reference to a suit brought by parties in that city against the village, growing out of matters

connected with the waterworks. In consideration of such assistance by the president of the council, and in order to secure his active services until the completion of the enterprise, the council, at a meeting held August 30, 1891, adopted a resolution appropriating to him the sum of fifty dollars per month from July 1st, previous to January 1st following. At such meeting Bevans was not present, and did not participate in the resolution, but in pursuance thereof orders were thereafter issued for one hundred and fifty dollars, which he collected.

According to one view of the complaint, it would seem as if the theory of the plaintiff was that this appropriation of money for services of the president of the council was regarded as an attempt to increase his salary, which would clearly be in violation of a specific limitation of the village charter, which forbids any member of the council from receiving more than three dollars per month during any one year for his services: Spec. Laws 1881, c. 30.

In defendant's answer it was alleged, however, that the services of Bevans were rendered to the village in an independent employment not germane to his official duties, and that all the services for which he was thus paid were outside the scope thereof. This is really the statement of a conclusion of law, for it is conceded in the record that Bevans was a member of the council; that the compensation for the services rendered were not accepted as a ¹²⁰ part of his salary, but dependent upon the resolution of August 30th; and, having received it, his duty to pay back the money is dependent upon his official relation to the municipality.

If the president of the council had the right, under the conceded facts, to enter into a contract with the village, which could only be negotiated through the council of which he was a member, for services which he was himself to render, we would be required to go further, and consider the orders of the trial court in the exclusion of testimony tending to show the meritorious character of the services actually rendered to the municipality; but we are very clear that the resolution was illegal, and could confer no rights upon a member of the council, based upon an agreement with that body for compensation. The relation of members of the council to the village was one involving trust and confidence, and such members could not make contracts with themselves relating to public affairs, or derive any emoluments therefrom not specifically authorized by law.

It is a fundamental principle that the same person cannot act for himself, and at the same time, with respect to the same matter, as the agent of another, whose interest might be in conflict with his. The two relations impose different obligations, and their union would at once involve a conflict between interest and duty: *Wardell v. Union Pac. R. R. Co.*, 103 U. S. 651. This rule is applicable to the officers of public as well as private corporations: *Dillon on Municipal Corporations*, secs. 444, 915.

In General Statutes of 1894, section 6666, it is provided that "a public officer, who is authorized to make any contract in his official capacity, or to take part in making any such contract, who voluntarily becomes interested individually in such contract directly or indirectly, is guilty of a misdemeanor."

The purpose of this statute is plain, and the contract, being within its express prohibition, was void, and cannot be made the basis of a valid contract relation: *Ingersoll v. Randall*, 14 Minn. 304 (400); *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299.

It is therefore immaterial, in view of the admitted facts, that the trial court refused to receive evidence tending to show that ¹⁸⁰ the services rendered by the president of the council were meritorious and beneficial, since he had no right to negotiate for or enter into the same with the official body of which he was a member at the time, and it is not now an open question in this state that money thus voted by a municipal body to one of its members may be recovered for the municipality at the suit of a taxpayer: *Bailey v. Strachan*, 77 Minn. 526, 80 N. W. 694.

Order affirmed.

Contracts between a city council or a board of supervisors and one of its members are unenforceable: *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 77; *Snipes v. Winston*, 126 N. C. 574, 78 Am. St. Rep. 666, 35 S. E. 610; and money paid thereunder to the officer can be recovered back: *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964; monographic note to *New Orleans etc. Co. v. Louisiana etc. Co.*, 94 Am. St. Rep. 424, 425.

SANDERSON v. NORTHERN PACIFIC RAILWAY CO.

[88 Minn. 162, 92 N. W. 542.]

APPEALABLE ORDERS.—An order granting or denying a motion for judgment is not appealable. (p. 510.)

DAMAGES FOR FRIGHT.—There can be no recovery for fright resulting in physical injury, in the absence of contemporaneous injury, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. (p. 513.)

C. Butts, for the appellants.

C. W. Bunn and L. T. Chamberlain, for the respondent.

¹⁶³ **START, C. J.** The plaintiff, A. W. Sanderson, on May 7, 1900, with his wife, Caroline Sanderson, and their four children, aged respectively four, six, eight, and twelve years, boarded one of the passenger trains of the Omaha Railway at Rice Lake, in the state of Wisconsin, for the purpose of going to St. Paul, and thence over the Northern Pacific Railway to Cedro, in the state of Washington. The father and mother each had a full through ticket, and the child twelve years of age, a boy, had a through half-fare ticket. The tickets were purchased of the station agent at Rice Lake. The party transferred to the defendant's passenger train at St. Paul. Before the train reached Minneapolis the conductor took up the tickets of the plaintiff and his wife, and the half-fare ticket of the boy, and demanded half-fare tickets for the other two children who were over five years old, or the payment of forty dollars, the price ¹⁶⁴ thereof. The father declined to pay any fare for the two children, for the reason, as he stated to the conductor, that he had an agreement with the agent when he purchased the tickets that the price paid therefor should entitle him and his family to be carried to their destination. The conductor, upon such refusal, caused the child eight years old, a boy, to be put off the car at Minneapolis, but he immediately returned into the car. The conductor attempted to get hold of the six year old child, a girl, to put her off, who was in a seat with her mother. In such attempt it is alleged that the conductor assaulted the mother, and that she was frightened by what took place in the attempt to remove the children from the car, whereby her health was seriously impaired. The father paid the forty dollars demanded, to avoid further trouble, and the party were carried to their destination. The conductor did not tender back any of the tickets which he had taken up.

The father and mother each brought an action in the district court of Ramsey county against the defendant for damages, which each claimed to have sustained by reason of the premises. The action of A. W. Sanderson was brought for the recovery of damages in the sum of two thousand and forty dollars, which he alleged he sustained on account of the forty dollars paid, and the loss of the services and society of his wife, and for medical treatment for her, all of which were due to the injuries she received by reason of the wrongful act of the conductor. The action of Caroline Sanderson, the wife, was brought to recover damages in the sum of two thousand dollars, on account of personal injuries sustained by the alleged assault made upon her by the conductor, and by reason of fright and shock due to the attempt to separate her children from her. The parties stipulated to try the cases at the same time and upon the same evidence, and that one record should cover both cases, but each should be separately submitted to the jury.

The trial court, at the close of the evidence, directed a verdict for the defendant in the case of Caroline Sanderson, and she appealed to this court from an order denying her motion for a new trial. The case of A. W. Sanderson was submitted to the jury, and a verdict was returned in his favor for forty-two dollars, being the sum paid to the conductor, and interest. Thereupon the defendant made a ¹⁶⁵ motion for judgment in its favor, notwithstanding the verdict, and the court made its order granting the motion, from which the plaintiff appealed. The plaintiff made a separate motion for a new trial, but the record discloses no order disposing of it, and the only appeal on his part is from the order granting the defendant's motion for judgment.

1. An order granting or denying a motion for judgment is not appealable, for such an order is simply one for a judgment, or one refusing it: *McMahon v. Davidson*, 12 Minn. 232 (357); *Rogers v. Holyoke*, 14 Minn. 387 (514); *St. Anthony Falls Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077; *Oelschlegel v. Chicago Great Western Ry. Co.*, 71 Minn. 50, 73 N. W. 631; *Kalz v. Winona etc. Ry. Co.*, 76 Minn. 351, 79 N. W. 310. Therefore the appeal in the case of A. W. Sanderson must be, and is, dismissed.

2. The question to be determined on the appeal of Mrs. Sanderson, hereafter designated as the plaintiff, is whether the evidence tends to show any legal basis for the recovery of damages by her. The evidence relevant to her case tends to show that

her husband was on the train with her and in charge of his family, and that he made the arrangements for their transportation, and that the station agent of whom he bought the tickets agreed that the sum paid to him therefor should be in full for the transportation of the entire family to their proposed destination, and, further, that the rules and rates of the defendant required that each of the children over five and under twelve years should be provided with half-fare tickets; that when the conductor caused the boy to be removed from the train, and attempted to eject the girl because the father refused to pay their fare, the plaintiff was greatly frightened by what occurred, and as a result of such fright she was made ill, and her health permanently impaired. The evidence, however, failed to show that any assault was committed upon her by the conductor, or anything done by him to cause her to apprehend any violence or injury to herself. She testified that her injury resulted wholly from fright, and that the conductor did not touch her, any more than to crowd in by her; that is, crowded her in trying to get past her to where the girl was. It may be assumed ¹⁶⁶ for the purpose of this decision, only, that his act was wrongful as to the children.

The plaintiff's case is, then, one where it is sought to recover damages for personal injuries due solely to fright and grief because an attempt was made to put her children off the car, and one where there was no tort against her, and no fear on her part of any physical injury or personal violence. The great weight of authority sustains the doctrine that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury to the plaintiff: *Notes to Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 862. This rule, as thus broadly stated, has not been accepted by this court; but, with the modification hereafter stated, it is the law of this state. In the case of *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435, the defendant shot a dog in the highway; and the plaintiff, a woman, standing near, whom the defendant did not see at the time he fired, was so seriously frightened by the report of the gun that she had a miscarriage, as the result thereof. It was held in that case that the plaintiff could not recover, for the reason that the fright was not the result of any legal wrong to her.

It was held in the case of *Keyes v. Minneapolis etc. Ry. Co.*, 36 Minn. 290, 30 N. W. 888, that the mental distress and anxiety which may be proven in actions for personal injuries must be confined to such as are connected with bodily injury; that fear

and anxiety for the safety of others cannot be made the basis for the recovery of damages.

In the case of *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238, it was stated as a rule that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. The case of *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, was one where a pregnant woman was a passenger on one of the defendant's cars, and by its negligence in the management of its cars at a street crossing a collision seemed inevitable, and she was placed in a position of such apparent imminent peril as to cause fright, which caused a miscarriage; and it was held, though there was in fact no collision and no impact, that the defendant's ¹⁸⁷ negligence was the proximate cause of the plaintiff's injury, and that she was entitled to recover for the consequences of her fright. It is to be noted in this case that the defendant's negligence which caused the fright was a legal wrong to the plaintiff as well as to all of her fellow-passengers. In other words, the act of the defendant which caused the plaintiff's fright was a tort against her.

In the case of *Bucknam v. Great Northern Ry. Co.*, 76 Minn. 373, 79 N. W. 98, the plaintiff, a married woman, entered with her husband the ladies' waiting-room in the defendant's depot; and the station agent unlawfully and untruthfully charged her companion with not being her husband, and used violent, offensive, threatening, and abusive language to him, and ordered him to leave the room, whereby she suffered a nervous shock which resulted in serious physical injuries. It was held that these facts afforded no legal basis for the recovery of damages by her, for the reason that the use of abusive language to her husband was not an infraction of her legal right, hence not a legal wrong to her, and for the further reason, as stated by Buck, J. (page 378, 76 Minn., and page 100, 79 N. W.), that: "She apprehended no danger to herself. At least, she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action, if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury."

The *Purcell* case has been criticised by some eminent courts, and approved by others, but it would seem that the trend of the more recent cases is to approve it: See 15 *Harvard Law Rev.*

304; 41 Am. Law Reg. 141. However this may be, it is the law of this state, and we are not disposed to question it, much less to overrule it. It is in entire harmony with the other decisions of this court which we have cited, for it is distinguishable from them by the fact that the fright of the plaintiff was due to a legal wrong of the defendant against the plaintiff, which was not the fact in the other cases. The question whether fright alone would constitute such injury that the law will allow a recovery for it was not involved in that case.

¹⁶⁸ From the consideration of the decisions of this court cited, we hold that there can be no recovery for fright, which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. As already stated, the plaintiff's case is not within the exception, and it follows that the trial court rightly directed a verdict for the defendant.

Order affirmed.

The Question Involved in the Principal Case as to the recovery of damages for fright is considered in the monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 862-865. In *Watson v. Dilts*, 116 Iowa, 249, 93 Am. St. Rep. 239, 89 N. W. 1068, it is held that nervous prostration arising from fright to a woman caused by stealthily entering her home in the night-time and committing a trespass on her husband's property, justifies a recovery against the trespasser, as the physical injury is the proximate result of his wrong.

HOLMES v. CATHCART.

[88 Minn. 213, 92 N. W. 956.]

AGENCY—Fraud of Agent—Duty to Disclose Facts.—An agent authorized by his principal to sell property on certain terms and for a specified price, who learns before sale is made that other and more advantageous terms and prices can be obtained, is bound to communicate such facts to his principal before making the sale, and his failure to do so is a fraud for which the principal is entitled to recover of him whatever loss he actually suffers through such failure. (p. 516.)

W. G. White, for the appellant.

J. F. Fitzpatrick, for the respondents.

²¹³ BROWN, J. The facts in this case are substantially as follows: Plaintiff, who resides at Buffalo, New York, was the owner of twelve houses in the city of St. Paul, all of which

were clear and free of encumbrance. The houses were somewhat out of repair, and, to render them habitable, certain expenses were necessary to be incurred; and, to avoid that expense, plaintiff was anxious to exchange the houses for other property. Defendant Cathcart was her agent, and acted for her in the care and management of the houses, collecting rents, making needed repairs, placing insurance on the property, and, in a way, her general representative at St. ²¹⁴ Paul. He undertook to make an exchange of the property, and at one time had under consideration a proposition which he thought might result beneficially to plaintiff; and he induced her to come on, with her husband, from her home in Buffalo for the purpose of an examination and inspection of the property proposed in exchange. The exchange did not take place, but later on Cathcart secured from one Horeish a proposition to exchange a brick block owned by him in the city of St. Paul, which was encumbered by a mortgage of fifteen thousand dollars, for plaintiff's twelve houses; but there were back taxes against the block and overdue interest on the mortgage to the amount of sixteen hundred dollars, which plaintiff would be required to pay to effect a trade.

Pending the consideration of the proposition by plaintiff—the evidence does not show that it had been rejected—Cathcart procured from Horeish a further contract by which the latter agreed to accept two of plaintiff's houses, free and clear of encumbrance, and the sum of two hundred dollars, for his property, subject to the mortgage and the payment of the back taxes and interest. At about this time—the precise date does not clearly appear—he entered into some sort of an agreement with the Pioneer Apartment House Company, by which that concern agreed to advance all money necessary to pay the back taxes and interest against the Horeish property, over and above the sum of one thousand dollars, in consideration of which it was to receive ten of the houses. Cathcart then informed plaintiff that he could effect an exchange of her twelve houses for the Horeish block, subject to the encumbrance, interest, and taxes (plaintiff to pay one thousand dollars, instead of sixteen hundred dollars, according to the previous proposition); and he subsequently informed her that the balance of the sixteen hundred dollars necessary to pay the back taxes and interest in full would be advanced by a third party, who was to receive some of the houses. She was not informed that Horeish was willing to exchange the brick block for two of her houses and the sum of two hundred dollars, subject to the mortgage and the taxes and

interest. She understood all along that all of her houses were to be transferred and exchanged for that property, and she was not informed at any time that the apartment house company was to receive ten of her houses for the amount of money it was to advance. She finally ²¹⁵ accepted this proposition, deeded the houses to the Pioneer Apartment House Company, and paid the one thousand dollars toward the back taxes and interest. The balance necessary to pay the same in full was paid by the apartment house company. The precise amount paid by it is not shown by the record, but it was probably in the neighborhood of twelve hundred dollars or fourteen hundred dollars, including a commission to Cathcart of the sum of five hundred dollars.

A verdict was directed for defendants at the trial in the court below when plaintiff rested. Defendants were not required to offer any evidence, and the facts in defense of the action, or upon which they would rely if required to defend, do not appear. This action was brought against both defendants—Cathcart, the agent, and the apartment house company—on the theory that those parties were in collusion, and that plaintiff was entitled to recover against both for any damage she had suffered for the failure of her agent to disclose to her all the material facts in reference to her exchange of the properties.

The evidence is insufficient, perhaps, to show a collusive agreement between the defendants, though it is somewhat strange, or at least not wholly clear, that the apartment house company should receive ten of plaintiff's houses for the nominal consideration of about twelve hundred dollars, when they were worth at least the sum of four thousand dollars. But at the trial below defendants joined in a motion to direct a verdict, which motion was granted; and, if the court erred in granting the motion as to either, a reversal must apply to both, and the case will be left as though no trial had ever been had, and must be tried again as to both defendants.

The theory on which the learned court below directed a verdict was that the plaintiff had not been injured by any act on the part of defendants, and she could not recover; that, as she was willing to part with all her houses in exchange for the brick block, it was immaterial to whom they were in fact deeded—whether to Horeish or to the apartment house company; that she lost nothing by the transaction, and has no cause of action. We think the court was in error. It is not controlling whether plaintiff was willing, or not, to make the exchange on the terms proposed to her. The action involves the duty of an agent when

acting for his principal, ²¹⁶ and whether he performed that duty in accordance with the law. The principal may authorize his agent to sell or exchange his property, but it does not necessarily follow that the agent, by carrying out the specific instructions given him, fully performs his duty, and is relieved from liability. He is bound to the exercise of the most perfect good faith, and to keep his principal informed of facts coming to his knowledge affecting his rights and interests. If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises. As stated by Chief Justice Gilfillan, in *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785: Upon this contract of agency, we are of the opinion that when the agent learned of a fact affecting the value of the property, and of which fact he knew the principal was ignorant when she fixed the price, and if the agent had reason to believe that, had she known the fact, she would have fixed a higher price, then good faith toward his principal required him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact he had learned, was, of course, a fraud upon her. That case is in accord with the unanimous voice of the authorities: *Mechem on Agency*, sec. 538; 1 Am. & Eng. Ency. of Law, 2d ed., 1069; *Arrott v. Brown*, 6 Whart. 9; *Devall v. Burbridge*, 4 Watts & S. 305; *Harvey v. Turner*, 4 Rawle, 223; *Tilleney v. Wolverton*, 46 Minn. 256, 48 N. W. 908.

Plaintiff was not informed at any time prior to the closing of the transaction that she could obtain the brick block for two of her houses and the payment of about sixteen hundred dollars in money, and the question arises whether defendant Cathcart should have communicated that fact to her. If, as now claimed by plaintiff, that bargain was a better one for her—more beneficial in its results—it was the clear duty of Cathcart to communicate the facts to her; and if, by his failure to do so, plaintiff was damaged, she is entitled to recover whatever loss she actually suffered. Whether defendant ²¹⁷ did fail in his duty in this respect is, of course, a question of fact, which we do not attempt to pass upon; but we do hold that the evidence offered by plaintiff on the trial was such as to require a finding on the question

by the trial court, or the submission of the same to a jury. The measure of her relief would be the actual damage suffered in consequence of defendant's failure of duty. The case must therefore be reversed.

It was also claimed by plaintiff that she was entitled to the commission received by defendant, Cathcart, her agent, and that the court erred in holding otherwise. It appears, without dispute, that Cathcart did receive from the apartment house company a commission of five hundred dollars for his services in effecting the exchange of properties. We do not concur with plaintiff's counsel, however, that plaintiff is entitled to any portion of it. The evidence disclosed by the record fairly shows that plaintiff contemplated that defendant should receive some sort of a commission, and this is clearly shown by the correspondence between the parties. As a condition to the acceptance of the final offer to exchange the properties, she distinctly stated that it must include all commissions to be received or claimed by Cathcart. It therefore appears from the record that Cathcart was entitled to negotiate for and accept and receive a commission for his services in the premises, and this with the knowledge and consent of plaintiff. And having done so with her express consent, he is entitled to retain the same.

Order reversed and new trial granted.

The Principal Case is supported by *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808, 52 N. W. 785.

CURRAN v. OLSON.

[88 Minn. 307, 92 N. W. 1124.]

NEGLIGENCE of Saloon-keeper—Injury to Guest.—A saloon-keeper is bound to use reasonable care to protect his guests and patrons from injury at the hands of vicious or lawless persons whom he knowingly permits to be in or about his saloon. Hence, he is liable to a guest who, in his presence, is injured by the act of a third person in pouring alcohol on such guest while he is asleep, and then setting it on fire. (p. 518.)

J. A. Sorley and F. C. Massee, for the appellants.

H. A. Bronson, for the respondent.

307 START, C. J. Action to recover damages for personal injuries sustained by the plaintiff while in the saloon of the de-

fendants, by reason of their alleged negligence in failing to protect him from an assault by a vicious and lawless person whom they permitted to be in and about their saloon. The answer was a denial. Verdict for the plaintiff in the sum of one hundred dollars, and the defendants appealed from an order denying their alternative motion for judgment or a new trial.

The question presented by the record is whether the verdict is sustained by the evidence. The defendants claim that it is not, because the evidence fails to show any negligence or wrong on their part, but that it does conclusively show that the plaintiff was guilty of contributory negligence. The evidence tends to show that the plaintiff for some days prior to his injury had been a ³⁰⁸ guest and a patron of the defendant's saloon at East Grand Forks; that, having spent all of his money therein, he went, on the night of February 10, 1902, into the saloon to sleep, and at about 1:30 A. M. he fell asleep in his chair; that a cook in a restaurant in the rear of the saloon, belonging to a third party, came into the saloon, got alcohol from the bartender in charge of the room, poured it upon the left foot of the plaintiff, and set it on fire, whereby he was seriously injured; and, further, that the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff. Neither of the defendants was present at the time.

The defendants were bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted to be in and about their saloon. If they delegated this duty to their barkeeper, they are responsible for his negligence in the premises: *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 Am. St. Rep. 446, 85 N. W. 913. The evidence is ample to sustain a finding by the jury that the defendants were guilty of negligence which was the proximate cause of the plaintiff's injury.

The claim that the plaintiff was guilty of contributory negligence is based upon the facts that before the plaintiff was injured, and during the same night, the cook on two separate occasions came into the saloon, and, finding a guest asleep, got alcohol, poured it upon the feet of the sleeper, and then set fire to it; that the plaintiff witnessed the orgies, and laughed and joked with the other guests over the discomfiture of the sleepers, and said nothing to the bartender about it; that he stayed awake as long as he could, so that alcohol could not be put on his feet and fired, but he at last fell asleep. The great weight of the

evidence is to the effect that the bartender not only knew of these two cases of brutality, but furnished the alcohol which the cook used. The evidence does not establish the contributory negligence of the plaintiff as a matter of law. The verdict is sustained by the evidence.

Order affirmed.

It is the Duty of the Proprietor of a saloon or tavern to see that his patrons are protected from the wrongdoing of those in his employ and those whom he chooses to harbor. And he is liable for injuries sustained by one who comes into his place and becomes intoxicated, by reason of another, who also becomes intoxicated there, and who, in view of the proprietor, attaches a piece of paper to the former and sets it on fire: *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, 11 Atl. 779. See, also, *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N. W. 918, 85 Am. St. Rep. 446, and monographic note.

FEWINGS v. MENDENHALL.

[88 Minn. 336, 93 N. W. 127.]

CARRIERS—Duty to Passengers—Protection Against Strikers.

A carrier of passengers is not required to exercise the utmost care and vigilance to protect them from the criminal acts of strikers and strangers, not under its control nor subject to its orders. As to the acts of such persons, carriers of passengers are liable for the exercise of ordinary care and prudence only. (p. 524.)

CARRIERS—Protection of Passengers Against Strikers.—A carrier of passengers is charged with ordinary care and prudence only to guard them against the lawless acts of strikers and strangers not under its direction or control, and its failure to pull down the blinds of the car in which a passenger is riding or to stretch a heavy canvas over the windows of the car as a protection against such lawless acts, is not negligence for which a recovery can be had for personal injuries received. (p. 524.)

CARRIERS—Protection of Passengers Against Strikers.—A carrier of passengers attempting to operate its cars during a strike of its employes is not guilty of negligence in failing to notify its passenger of the violent conduct of such strikers and their sympathizers, over whom he has no direction or control. (p. 525.)

Green & Wood, for the appellant.

J. Jenswold, Jr., for the respondent.

~~228~~ **BROWN, J.** Action to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant. Plaintiff had a verdict in the court below, and de-

fendant appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

The case was here on a former appeal: *Fewings v. Mendenhall*, 83 Minn. 237, 86 N. W. 96. The facts are there fully stated, but for an understanding of the questions presented at this time, a restatement is necessary; but in doing so we follow substantially the statement there made. Defendant, as receiver of the Duluth Street Railway Company, has operated its street-car system since July, 1898. On May 2, 1899, a general strike was inaugurated by the employés of the company, which was maintained until after the plaintiff was injured as hereinafter stated. Defendant procured other men to take the place of the strikers, and continued to operate the street-car lines. On Sunday evening, May 7th, plaintiff took passage in a car operated by defendant, at Superior, in the state of Wisconsin, for Duluth. While the car was going northerly along Garfield avenue in Duluth, and as it approached Michigan street, a young man, not in any way connected with the company as an employé or otherwise, not a passenger, nor in any way under the control or direction of defendant, threw a stone at the car in which plaintiff was so riding, which passed through the window thereof, and struck plaintiff on the head, whereby he was seriously injured. He brought this action to recover damages because of such injury, basing his claim to a right of recovery on the alleged negligence of defendant in failing to take proper precautions to prevent injuries from acts of this kind.

The complaint alleges, among other things, that plaintiff, as a passenger, was exposed to imminent danger by reason of the violent and unlawful acts of the strikers and their sympathizers; and that defendant, in the exercise of due care and prudence, could have prevented the same and protected plaintiff and the other passengers in the car from injury; but, notwithstanding this, that he carelessly failed and omitted to warn the plaintiff of any danger, or to make any effort or take any precautions to prevent ³³⁹ injury to him, or to provide or make use of any barriers or other means to avert injury resulting from acts of the kind complained of. It was held on the former appeal that defendant was not guilty of negligence in attempting to operate the cars during the strike, and that the trial court erred in submitting that question to the jury. The cause was remanded, and again tried, resulting in a finding by the jury that defendant was guilty of negligence in failing to take proper precautions to avert and prevent accidents of the kind complained of, and returned a

verdict for plaintiff for the sum of ten thousand three hundred and eighty-three dollars and thirty-three cents.

The principal question presented for consideration at this time is whether the evidence is sufficient to sustain a finding of actionable negligence against defendant. Other questions are discussed in the briefs of counsel, but the evidence upon this question appears to be substantially the same as on the former trial, and it is due to the parties that the question be now met and determined, that the litigation may be brought to an end, and further expense obviated. In the consideration of this question it is proper to inquire first the degree of care required of defendant under circumstances like those shown, for in determining whether he was guilty of negligence which was the proximate cause of plaintiff's injury we must be guided by the rules of duty and care necessary to be exercised in such cases. Though no exceptions were taken to the charge of the trial court, wherein the jury was instructed that defendant was charged with the highest degree of care and foresight for the protection of plaintiff while a passenger, the question is properly presented by the errors assigned on the motion for a new trial and by the assignments of error in this court.

The strike which the employes of the street railway company inaugurated was bitterly and stubbornly contested, and resulted in much lawlessness and acts of violence on the part of the strikers and their sympathizers toward the property of the company, with the purpose in view of preventing the operation of the cars and forcing a submission to their terms. The act which resulted in plaintiff's injury was not committed by an employé, a fellow-passenger, or by one having any connection or relation whatever³⁴⁰ with the company, but by a boy who was in no way under the control of the company or any of its agents. He was a sympathizer with the strikers, and by his act of lawlessness no doubt thought he was aiding their cause.

The question as to the extent of responsibility of a carrier of passengers and the degree of care essential to be exercised for their protection as to acts committed by strangers to the carrier has never, prior to this case, been presented to this court for its decision. The general rule that such carrier is required to exercise the highest degree of care and foresight consistent with the orderly conduct of its business is one that has very uniformly been applied by all the courts in cases where the act or omission complained of as negligence was in respect to a matter under the control of the carrier. A carrier of passengers is required to ex-

ercise the highest care in respect to the equipment of its road and transportation facilities, in providing suitable machinery for the operation of its cars, in the employment of competent and faithful servants and agents, and generally, as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier; and in respect to such matters the rule has always been very strict.

It is insisted by plaintiff that the rule applies to this case, and that it was the duty of defendant, in view of the condition surrounding the strike, to exercise the utmost care and vigilance to guard and protect plaintiff, while a passenger, from acts of violence at the hands of persons, whether under the control of defendant or not, and from dangers from whatever source arising. It is insisted that the act of the boy who threw the stone in question was such as the defendant might, from the circumstances and conditions of the strike, reasonably have anticipated, and could have guarded against and prevented.

We have been cited to no case where the high degree of care essential as to matters within the control of the carrier has been extended and applied with all its force and strictness to acts of persons beyond its control, and for which it was in no way responsible, directly or indirectly. Some cases cited and relied upon by plaintiff do not sustain his position.

³⁴¹ *Exton v. Central*, 62 N. J. L. 7, 42 Atl. 486, was a case where the company had permitted hackmen to occupy its premises in soliciting trade, and a passenger was injured by their misconduct. The company was held liable; but the decision is placed upon the ground that the company had the right to control its depot grounds and buildings, and, as it permitted hackmen to occupy the same, was responsible to passengers for injuries resulting from their misconduct, if it failed to exercise proper care to protect them.

Wright v. Chicago, 4 Colo. App. 102, 35 Pac. 196, was a case where the company permitted disorderly persons to become and remain passengers, and is not in point. It was the clear duty of the company in that case to exercise the highest care to prevent injury to passengers from the acts of disorderly passengers, and the strict rule was clearly applicable to the facts there shown. It is well settled that a carrier of passengers is bound to exercise the utmost care to maintain order and guard and protect passengers from violence and insult at the hands of fellow-passengers, from such injury and insult as might reasonably have been anticipated or naturally expected to occur, in view of all the circumstances

and the number and character of passengers on board: *Lucy v. Chicago Great Western Ry. Co.*, 64 Minn. 7, 65 N. W. 944; *Mullan v. Wisconsin Cent. Co.*, 46 Minn. 474, 49 N. W. 249. The rule is founded upon the fact that the company has control of its cars and premises, a police supervision to prevent violations of the law, and may lawfully eject and remove disorderly persons therefrom, or arrest or otherwise suppress and control them.

In *Savannah v. Boyle*, 115 Ga. 836, 42 S. E. 242, the employees of the company had taken two tramps, who were concealed about the train, and trespassers thereon, and placed them in the express-car, tying them there with a rope about their wrists. During their struggle to escape, one of them shot the express agent in charge of the car. The general principle of law was applied, and it was held that it was the duty of the railway company to protect its passengers from insult or injury at the hands of a fellow-passenger, or third person, when the circumstances are such that a person in the exercise of that degree of diligence known to the law as extraordinary care would see and apprehend that the passenger was in danger of injury. It was accordingly held that, as the company had placed the tramps in the car, and assumed charge and control of them, the strict rule of care essential in such cases applied, and protected the express agent to the same extent as a passenger. *Empire Transp. Co. v. Philadelphia etc. Iron Co.*, 23 C. C. A. 564, 77 Fed. 919, and *Haas v. Kansas City etc. R. R. Co.*, 81 Ga. 792, 7 S. E. 629, were cases involving the liability of carriers of freight, and are not in point, for a different rule of responsibility exists as to such carriers. In respect to goods a carrier is an insurer for the safe transportation and delivery of the property intrusted to it for carriage, and is relieved from liability only by the act of God or the public enemy. A carrier of passengers is not an insurer of their safety, and is liable to them for such injuries as result from its failure to exercise proper care for their protection.

A number of other cases are cited and relied upon by counsel, wherein the general rule is stated substantially as contended for by him, namely, that a carrier of passengers is required to exercise the utmost vigilance to protect passengers from insult and injury from whatever cause arising; but an examination of them shows that they are all cases where the carrier had permitted third persons to enter upon its premises or cars, and thereafter failed to exercise a proper degree of care to restrain them from acts of lawlessness; and there can be no question as to their soundness.

The question before us is whether this strict rule applies to the act of a stranger, such as here shown. That it does not is sustained by some very respectable authorities: *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462, 10 Am. St. Rep. 601, 17 Atl. 14; *Thomas v. Philadelphia R. R. Co.*, 148 Pa. St. 180, 23 Atl. 989; *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9, 21, 14 N. E. 22, 5 Am. St. Rep. 483.

In our opinion, it would be unjust to require a carrier of passengers, either a steam or a street railway company, to exercise the utmost care and vigilance to guard and protect passengers from criminal acts of strangers, persons not under its control or subject to its orders, and for whose acts it is in no way responsible. ³⁴³ And we hold, without further discussion, as respects the acts of such strangers, that carriers of passengers are liable for the exercise of ordinary care and prudence only. Such carrier is liable for all injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances, and which ordinary care and prudence, had they been exercised, would have prevented.

It remains to consider whether, within this rule, the evidence is sufficient to sustain the charge against defendant of actionable negligence, the burden to show was upon the plaintiff.

The familiar rule that evidence of an accident is *prima facie* proof of negligence against the carrier can have no application to this case, because the act resulting in the injury did not arise from any act or omission of defendant. The presumption of negligence in such cases arises only where the thing causing the injury complained of was under the exclusive control of the carrier or its servants or employes. The act complained of here being that of a stranger, it was incumbent upon plaintiff affirmatively to prove that defendant failed to exercise proper care to prevent it. The question arises whether the evidence was sufficient to charge defendant with negligence in this respect. What, if anything, should he have done, which he did not do, to protect plaintiff and other passengers from acts of this kind? It is claimed that he should have pulled down the blinds of the car in which plaintiff was riding. It appears that the material of the blinds inside the windows was leather, and the contention is that, had they been pulled down, the stone thrown by the boy would not have passed into the car, or in any way injured the plaintiff. It is also contended that the defendant might have protected plaintiff from this injury by stretching a heavy canvas over the windows out-

side the car; and, lastly, that he should have informed plaintiff of the conditions existing during the strike, the fact that violent and lawless acts were being committed by the strikers and their sympathizers.

As to the first two theories of the plaintiff—pulling down the inside blinds and stretching a heavy canvas outside the car over the windows—we are of the opinion that the failure to do this is ²⁴⁴ not sufficient on which to base a recovery. It would be unreasonable to require of defendants so to act, and though, perhaps, the suggested precaution would have prevented such an injury as that here complained of, and conceding that defendant was bound to anticipate an unlawful act of this kind, the rule of ordinary care and prudence is not so exacting as to require one charged with its exercise to take doubtful or unreasonable precautions to guard against the lawless acts of strangers. And, besides, it is reasonably clear that, had defendant pulled down the blinds of the car in question, or covered the outside of the windows with a heavy canvas, it would have provoked the strikers and their sympathizers to acts of greater violence. They would naturally have assumed, on seeing the car pass in that condition, that either the officials of the road or nonunion or scab employes were aboard, and it would have incited the lawless element to greater efforts to prevent the operation of the cars.

As to the third proposition—that defendant was in duty bound to notify plaintiff of the violent conduct of some of the strikers and their sympathizers—we are unable to concur with plaintiff, for these reasons: He was a resident of Duluth, and had occasion daily to use the cars of defendant in passing to and from his home to his place of business. He knew that a strike had been inaugurated by the street-car employes, and the conditions surrounding it were so notorious and generally known as to preclude the possibility, even, that he was not fully aware of the lawlessness of the strikers. He was in as good a position as was defendant to anticipate dangers of this kind. Whatever defendant knew concerning the acts of the strikers was obvious and apparent to all persons of ordinary intelligence. Defendant exercised the precaution of inducing the city authorities to swear in a large force of extra policemen to prevent criminal acts of the strikers and their sympathizers. If they were unable to control the mob and prevent acts of this kind, we are at a loss to know what defendant could have done to prevent them, short of armoring his cars, and this, of course, would be so unreasonable a requirement as not to be thought of for a moment. It is not reasonable

345 to suppose that, had defendant given this warning to plaintiff, it would have had the effect claimed for it—protected him.

Our conclusion upon the whole record is that the evidence relied upon is insufficient to charge defendant with actionable negligence. The questions on which we have disposed of the case at this time were not intended to be covered by the former decision. Some expressions in that opinion may be construed as announcing the law on certain phases of the case, but they were not so intended. But one question was there decided, and any expressions therein which may be inconsistent with the conclusions now arrived at must be regarded as obiter. Some members of the court, when the case was here before, were in some doubt upon the principal question now decided, but those doubts have been overcome fully by the further argument and consideration of the case, and we are all agreed upon the conclusion now reached.

The action has been tried several times. The facts are practically undisputed. The only claims of negligence relied upon by plaintiff in support of the verdict are those just pointed out, and for the reason that the failure of defendant in these respects is not sufficient to charge him with negligence within the rule of ordinary care and prudence, the case should be brought to an end, and further litigation and expense obviated by a final judgment.

It is therefore ordered that the order appealed from be reversed, and the cause remanded to the court below, with directions to enter judgment for defendant.

LIABILITY OF CARRIERS FOR INJURIES DONE BY STRIKERS OR MOBS.*

- I. To What Degree of Care Carriers of Passengers are Held.**
 - a. Not Insurers.
 - b. Incidental Risks.
- II. Knowledge or Anticipation of the Wrongful Act.**
- III. Diligence Required of Passengers.**
- IV. Carriers' Duty to the Public to Run Cars During Strikes.**

- I. To What Degree of Care Carriers of Passengers are Held.**
 - a. Not Insurers.—How far carriers are liable to their passengers for injuries inflicted upon them by strikers or mobs presents an interesting and important question. Having been litigated seldom, there are but few authorities directly in point, but cases dealing gen-

***REFERENCES TO MONOGRAPHIC NOTES.**

Degree of care required with respect to passengers: 43 Am. Dec. 355; 1 Am. St. Rep. 200.

Duty to protect passengers from injury by third person: 6 Am. St. Rep. 734.

Assaults on passengers by third persons: 28 Am. Rep. 112.

erally with the liability of transportation companies for acts of strangers throw much light upon the subject, the principles involved being the same.

It becomes necessary in the first place to determine what diligence they must exercise in protecting their passengers. They have never been considered as insurers against accidents, but are held to the utmost care, consistent with the mode of conveyance and its practical operation: *Wright v. Chicago etc. R. Co.*, 4 Colo. App. 102, 35 Pac. 102; *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103, 27 Atl. 689; *Cennell v. Chesapeake etc. R. Co.*, 93 Va. 44, 57 Am. St. Rep. 786, 24 S. E. 467; and if such care is used they are not liable, there being no liability unless there is negligence: *Lake Erie etc. R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394.

b. *Incidental Risks.*—This rule is not so strict as to dangers not usually incidental to travel: *Chicago etc. R. Co. v. Pillsbury*, 125 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22, reversing 8 N. E. 808. The court there said: "So far as the machinery and cars furnished for the carriage of passengers, the fitness of the roadbed, and the competency and faithfulness of the servants employed, and in the use of the best known mechanical appliances to insure safety, are concerned, the passenger must rely solely on the carrier, and can do nothing to insure his personal safety. It is for that reason the carrier, in this respect, is obligated to the highest reasonable and practicable skill and diligence. The safety of passengers requires the strict and rigid observance of this rule against all carriers, by rail or otherwise; but as to dangers and perils not incident to ordinary perils by any mode of travel, the rule of liability imposed upon the carrier of passengers by law is less stringent. . . . With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger to and consequent injuries to passengers, must depend in a large measure on the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for his own personal safety, it will be exonerated from liability. In other cases and under other circumstances it will, no doubt, be the duty of the carrier to exercise the utmost care, skill and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care and skill and diligence, could have been reasonably and practically foreseen and anticipated in time to prevent injury."

A mob by the wayside constitutes such an incidental risk: *Pittsburgh etc. Ry. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224, in which case a mob rushed on a train, and it was held that the company was not liable if the conductor in charge could not stop it, but if he could, and did not, there was negligence, making the company liable. In *Benworth v. Union R. Co.*, 25 R. I. 202, 55 Atl. 490, it was held that

a carrier must use the utmost care in attempting to run a car through a mob.

Where a person over whom the company has no control wrongfully misplaces a switch, killing a passenger, the company is not liable, there being no cause to apprehend the happening of such an event: *Keeley v. Erie R. Co.*, 47 How. Pr. 256; and there is no good reason why the same should not apply if the act had been perpetrated by strikers, bent on wrecking a train. In *Krone v. Southwestern etc. Ry. Co.*, 97 Mo. App. 609, 71 S. W. 712, a stranger gave the signal to start just as a passenger was alighting, with the result that the passenger was injured. No liability was held to attach to the company, for in order to render them liable there must be an absence of care and foresight.

II. Knowledge or Anticipation of the Wrongful Act.

The all-important question to be decided in cases where a carrier is being sued for injuries inflicted by a stranger is, Did the carrier know or anticipate such act, or should he have done so? If he should, then it is his duty to use the greatest care in guarding against it. If not, no liability attaches: *Kinney v. Louisville etc. R. Co.*, 99 Ky. 59, 34 S. W. 1066. So where a woman passenger was assaulted by a drunken man in a waiting-room, the agent being present and not interfering, there is actionable negligence: *Houston etc. R. Co. v. Phillio (Tex.)*, 69 S. W. 994, reversing 67 S. W. 915.

According to the principal case, *Fewings v Mendenhall*, 88 Minn. 336, 93 N. W. 127, 83 Minn. 237, 86 N. W. 96, it is not negligence per se to operate a car during the existence of a strike. Where, however, there is sufficient to inform the company that acts of violence may be expected, and they fail to take precautions to guard against it, they are liable for such injury as a passenger may sustain, attributable thereto. A case of that kind was *Chicago etc. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22, reversing 8 N. E. 803. There a number of nonunion laborers had been taken on board a train, and it was held negligence for the company to stop and receive them on board, knowing that violence was likely to ensue, and which actually did ensue, resulting in injury to a passenger, the court saying: "It must have been found they knew a desperate and wicked mob, consisting of great numbers, was organized there, to prevent at all hazard, whatever the consequences might be, the taking on of these men, and that it could only be done by the aid of a powerful and efficient police force. Prior to the time the plaintiff was injured, the box-cars containing these laborers had been assailed, and it might reasonably have been inferred the danger to passenger cars on the same account was imminent, and common prudence should have induced the taking of extraordinary precautionary measures. It could have been readily ascertained upon the slightest inquiry the fury of the mob had in no degree abated. Reasonably. it might

have been inferred that it would be dangerous to continue to take on and put off the laborers in the midst of that lawless assembly of rioters. Even ordinary care would have discerned the danger. Under the circumstances, the law would charge defendant with negligence in stopping a train filled with passengers, in the midst of a howling, revengeful, lawless mob, to take on persons whom the mob were seeking an opportunity to maltreat. The defendant was under no legal obligation to stop its train at the point in question, as it was not a station designated for that purpose. To do so was a needless and unwarrantable exposure of the lives and persons of passengers to imminent peril. This train, filled as it was with men, women and children, as it may be presumed it was, stopped at a point not a station, in the midst of a fierce mob, and the object of its vengeance taken into the same car with passengers. This was unwise and hazardous in the extreme, to say the least of it. At all events, the offensive persons should have been placed in a car to themselves, where they could have been protected, or could have protected themselves, without danger to regular passengers who had not previously been advised as to the danger to be encountered."

Another case of a lawless mob was *Pounder v. Northeastern R. Co.* (1892), 1 Q. B. 385, which was an action to recover of a railroad company damages done to a passenger for assaults committed upon him. The facts were that the plaintiff had been employed in evicting pitmen from their houses, and had thus incurred the ill-will of that class in the neighborhood in which he was traveling; but when he bought his ticket, the defendant company had no notice that he was exposed to greater danger than an ordinary traveler. Before the train started a number of pitmen at the station threatened him with violence, in the hearing of some of the company's servants, and he got into the guard's van for safety, from which he was removed and placed in a third-class carriage by the servants of the company, who then knew he had been engaged in the evictions and feared violence. Pitmen then crowded into the car in which he was, and the employes of the company did nothing to get them out or to get plaintiff another seat. He was assaulted at each station at which the train stopped, but nothing was done to secure his safety when he complained.

The court held that he could not recover, the company owing no duty to take extraordinary care of a passenger by reason of any unknown peculiarity then attaching to him. Granting that the railroad company had no reason to anticipate attacks of this kind, still when its servants did see that violence would result and did in fact repeatedly occur, they should be held to afford their passenger at least ordinary protection against assaults which they knew were bound to happen if no outside agency intervened. A somewhat similar case arose in *Wright v. Chicago etc. R. Co.*, 4 Colo. App. 102, 85 Pac. 196, where a passenger was assaulted on a train by strangers,

and called for help. The court reached a different result from the English case above referred to, saying: "In this case there is nothing in the record to indicate that the assault upon the plaintiff could have been anticipated, or could possibly have been foreseen, so that the defendant incurred no responsibility for failing to guard against it. Whether it was known while in progress was another question. If the cry for help was loud enough to be heard by the agents or employees of the defendant attached to the train, supposing each of them to be at his post of duty on or near the train, they will be presumed to have heard it. The vigilance which is exacted of them requires them to be alert, and to keep their eyes and ears open; and, whether they heard the call or not, if it was loud enough to reach them they should have heard it, and so should have responded at once by going to plaintiff's assistance."

In *Cobb v. Great Western R. Co.*, [1894] App. Cas. 419, 63 L. J. Q. B. 629, 6 Rep. 203, a passenger on a train was robbed by a gang of men who entered the car where he was, but upon complaint, the station master refused to detain the train to permit the men to be given in custody and searched, but started it, whereby the plaintiff lost his property. It was held that no breach of duty was disclosed, and hence no cause of action. In that case the Earl of Selborne questioned the correctness of the decision in *Pounder v. Northeastern Ry. Co.* (1892), 1 Q. B. 385, although not necessary in deciding the case before them, and distinguished them on the ground that in the former case the plaintiff's complaint was made not before, but after, he had been robbed.

Where the crew of a train was at dinner and no one was in charge, the company was held not liable for an assault which was unexpected: *Thweatt v. Houston etc. Ry. Co.* (Tex. Civ. App.), 71 S. W. 976. It is a carrier's duty to give notice and warn an alighting passenger who is in imminent danger of being injured by violence at the hands of outside parties, the same as it would be to protect them against assaults at the hands of others. So where a passenger alighting from a train is wounded by people having a fight with pistols at the depot, and he should have been warned, the company is liable for all injuries he receives therefrom: *Penny v. Atlantic etc. R. Co.* (N. C.), 45 S. W. 563, citing *Britton v. Atlanta etc. R. R. Co.*, 88 N. C. 536, 43 Am. Rep. 749. Where the car in which the plaintiff was a passenger was sidetracked near a rifle-range, and while the car was standing there, the owner of the rifle-range shot toward and into the car, injuring the plaintiff, the company was held liable if it had knowledge or should have had as where the owner was in the habit of using the space for target practice: *Dufur v. Boston etc. R. Co.* (Vt.), 53 Atl. 1068.

Where some intruders entered a waiting-room at a station and behaved in a disorderly and obscene manner before a female passenger, no liability was held to attach to the company, in the absence

of a showing of expectation on the part of the company of such acts: *Batton v. South etc. R. Co.*, 77 Ala. 591, 54 Am. St. Rep. 80, the court quoting from *Britton v. Atlanta etc. R. R. Co.*, 88 N. C. 536, 43 Am. Rep. 749, where the rule is stated to be that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passengers from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." The presence upon the train of two tramps stealing a ride is not sufficient of itself to cause those in charge of the train to suspect that those tramps were armed with deadly weapons and to anticipate that they would attempt to use them in trying to escape when brought into the train under arrest, and commit an assault with them upon one whom the company owed the duty of protection, as an express messenger: *Savannah etc. R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 242.

In *Missimer v. Philadelphia etc. R. Co.*, 17 Phila. 172, it was held that a railroad company need not put screens at car windows to protect passengers against missiles thrown by persons on the outside over whom the company had no control; but that a case might be conceived where repeated acts of stone-throwing at a particular locality, known to the company, might raise a duty to take such measures.

III. Diligence Required of Passengers.

In *Clere v. Morgan's etc. R. Co.*, 107 La. 370, 90 Am. St. Rep. 819, 51 South. 886, it is said: "While a carrier is held to very strict care, the passenger himself is not relieved of all obligation of taking care of his own safety, but, 'unlike the carrier,' he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury. . . . The standard by which to determine whether or not a normal adult passenger has failed to exercise the degree of care is, whether his conduct is that of a prudent, reasonable man, in possession of his ordinary senses and capacities placed in his situation." In *Lake Erie etc. R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394, a complaint against a railroad company for negligently permitting a passenger to be assaulted was held bad on demurrer because it failed to aver that there was no contributory negligence on the plaintiff's part.

IV. Carriers' Duty to the Public to Run Cars During Strikes.

When the case of *Fewings v. Mendenhall* (the principal case), 88 Minn. 236, 93 N. W. 127, was before the supreme court on a former hearing, 83 Minn. 237, 86 N. W. 96, the duty which a common carrier

owes to the public to operate its cars in times of strikes is clearly pointed out, the court saying: "The question as to when and under what circumstances street railway companies will be held, as to passengers, guilty of negligence in attempting to operate their cars at all during a strike of its employes, is an important one to them, and to the public as well. To the former, for, if they are to be held guilty of negligence in attempting to operate their cars whenever force and intimidation are used by their striking employes to compel them to suspend the running of their cars, then they must submit to such unlawful force and cease to discharge their duties to the public, or yield to the demands of the strikers, whether just or unjust. Especially important is the question to the public, for the uninterrupted operation of an efficient street-car system has become a practical necessity to a large number of our urban population. They have established their homes, arranged their business and work with reference to it, and their comfort, convenience, and pleasure are largely dependent upon it. Therefore those who are charged with the public duty of operating street-cars in consideration of valuable franchises cannot be permitted to omit the duty for any cause save the most pressing, such as the practical impossibility of discharging the duty, consistent with the further duty to exercise the utmost vigilance and care in guarding their passengers against violence, from whatever source arising, which may be reasonably anticipated or naturally be expected to occur, in view of all the circumstances of each particular case. It then necessarily follows that a street railway company is not guilty of negligence, as to its passengers, in attempting to operate its cars during a strike of its employes, unless the conditions are such that it ought to know, or reasonably to anticipate, that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers."

OTTE v. HARTFORD LIFE INSURANCE COMPANY.

[88 Minn. 423, 93 N. W. 608.]

INSURANCE—Authority of Agent.—If a foreign insurance company has a general manager within the state authorized to appoint canvassers, such canvassers, while engaged in taking applications for insurance on blanks furnished by the insurer, are its agents, and their acts within the apparent scope of their authority, are binding upon it. (p. 535.)

INSURANCE—Fraud of Agent—Effect on Insured—Warranty. If an application for insurance is made out by the authorized agent of the insurer, and the insured truthfully states the real facts,

but such agent writes his answers incorrectly, and the insured signs the application in good faith and without knowledge of the agent's fraud, the insurer is bound by the policy issued and accepted by the insured although there is a provision in the application attached thereto that the statements of the insured therein shall be considered as warranties. In such case the warranties of the insured must be treated as having been waived by the insurer. (p. 536.)

Tryon & Booth, for the appellant.

E. Otte and W. Hodgson, for the respondent.

⁴²⁶ LOVELY, J. Action on a life insurance policy issued to William Otte, since deceased. His widow is the beneficiary. The cause was tried to the court and a jury. There was a verdict for plaintiff. A motion for judgment, or a new trial in the alternative, was overruled. From this order defendant appeals.

The insured was a farmer living near Randolph, in this state. One E. L. Hills was acting as a canvasser for defendant. Late in November, 1900, he went to the home of Otte, and requested him to apply to defendant for a policy on his life. As a result of Hills' solicitations, he was authorized to make out Otte's application for a policy in defendant's company for fifteen hundred dollars. The application contained questions relative to Otte's death. The answers were written therein by Hills. It was signed by Otte, and forwarded by Hills to the general manager of the company for Minnesota, located at Minneapolis, who then sent it to the general office, at Hartford. In due time the risk was accepted, and a policy issued, ⁴²⁷ which was delivered to the insured, who paid the premium. In the application were the following questions and answers:

"Q. Are you now in sound physical and mental health, so far as you know? A. Yes. Q. How much time have you lost by sickness during the last three years, for which you were attended by or consulted a physician? A. None. Q. When did you last consult a physician? A. Never. Q. For what disease? How long were you sick? Fully recovered? A. None. Q. What are the names and addresses of every physician consulted in the last three years? A. None. Q. Have you now, or have you ever had any of the following diseases? If so, give the dates and full particulars. If not, answer 'No.' Asthma, difficulty in breathing, pleurisy, pneumonia, consumption, chronic or persistent cough, spitting of blood, or any lung disease? A. No. Q. Diseases of the liver, kidneys, bladder, enlargement of the prostate gland, renal or hepatic colic from stone or gravel? A. No."

There was attached to the application a certificate for the physician of the company, Dr. Woodward, of Cannon Falls, who was required to examine the applicant and certify to his state of health; but Hills, who was a physician, inserted the answers therein, and carried it to Dr. Woodward, who, at such request, approved and signed the same, relying upon the statements of Hills, instead of an examination by himself, as required by the regulation of the company, which regulation was not known to Otte.

The legal relation of Hills to the insurer and insured is an important subject of contention in determining the liability of defendant. But the facts are not in dispute. Previous to the application, defendant had appointed Samuel Johnson its general manager for Minnesota, to reside at Minneapolis. The manager was authorized to take applications for life insurance, and forward the same to the home office, in Hartford, for action. He was not, however, the only person soliciting insurance for defendant in his territory, for he was authorized by the company to appoint solicitors to canvass for applications under terms of compensation to be paid by him. Upon this authority, Johnson appointed Hills to solicit insurance for defendant, and furnished him with blank applications for that purpose. Hills entered upon and continued in such employment for over two months, with the approval ⁴²⁸ of the general officers of the company, and it was during this time that Otte was insured. On the application the name of Hills appeared as a witness, which was recognized by defendant's secretary at the home office as evidence of the fact that he was a solicitor acting under authority derived from Johnson. Hills' name as agent was also indorsed on the back of the policy, though it may have been placed there by the manager, or by Hills himself.

While it is conceded that insured had consulted several physicians within three years previous to the application, and was informed by each of them that he was afflicted with diabetes—a dangerous malady, affecting his health and insurable capacity—there was evidence, whose weight was for the jury, tending to show that, at the time Hills was making out the application, he was informed of these material facts. In reply the solicitor continued to persuade Otte to make the application, and substantially told him that he was a good risk, and that diabetes would not prevent him from obtaining insurance. The evidence is such in respect to the questions and answers quoted that the jury were justified in finding that none of them, as to the previous informa-

tion from the physicians he had consulted, was misrepresented, or that he knew he was suffering from a dangerous disease that would interfere with his obtaining a policy. In these respects the insured relied wholly upon the agent, and signed the application without reading it or with knowledge of its contents, believing that the true facts conveyed to the solicitor were either set forth therein, or were not required to be stated. Five months after the delivery of the policy to the insured, he died; and the evidence is such as to leave no doubt that at the time the application was made, and the policy written, he was afflicted with diabetes, which disease was the efficient cause of his death.

It is strenuously insisted for defendant that Hills, in writing the application, was not the agent of the company, but merely an insurance broker, and that, in the legal sense in which this term is understood, he was the agent of the insured, as in *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220, 54 N. W. 1117; hence that his acts could not bind the defendant. But upon the facts as above summarized, we are of the opinion that it was within the ⁴²⁹ authority of Hills to take applications, and to do that which is usual and customary among insurance solicitors receiving their authority directly from the company they represent. The defendant could not transfer its authority to receive applications to a general manager, with power to appoint solicitors, and thereby absolve itself from the necessary consequence which follows, or from the acts of the latter within his apparent authority. The general agent at Minneapolis having the power to appoint Hills to canvass, he might, according to the usual custom among those engaged in the business of canvassing for insurance, write out the application and the answers to questions put to the applicant; and, though his appointment did not come directly from the company, this could make no difference, since it did come from the defendant through the delegated authority conferred upon the Minnesota manager to appoint the subagent who was clothed with the necessary and essential power to do that in taking the application which the manager might have done had the latter been present and written the application himself: *Swain v. Agricultural Ins. Co.*, 37 Minn. 390, 34 N. W. 738.

And this brings us to the question whether the incorrect and untruthful statements made by the solicitor, Hills, bound the company. We have already held that agents of an insurance company, authorized to procure applications for insurance, and forward them for acceptance, must be deemed the agents of the insurer in all that they do in preparing the application, or in any

representations they may make in the material statements therein contained: *Kausal v. Minnesota etc. Ins. Assn.*, 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; *Wilson v. Minnesota etc. Ins. Assn.*, 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; *Whitney v. National etc. Assn.*, 57 Minn. 472, 59 N. W. 943. The admission of verbal testimony to show that the application was filled in by the solicitor, and that the relevant and material facts affecting the risk in this case were correctly stated, but, without knowledge or any fraud of the insured, misstated in the application, was relevant and proper, and cannot be attributed to the insured, under the rule adopted in *Kausal v. Minnesota etc. Ins. Assn.*, 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, where the reasons for this rule are fully discussed, and the general doctrine above announced ⁴³⁰ applied. There is a conflict upon this question in the courts of this country, but we are not now inclined to depart from the rule we have already adopted, which we regard as salutary and wholesome, since we are satisfied with the reasons given in the above-cited cases. We think the weight of authority approves our views in this respect.

The policy, when received by the insured, had attached to it a copy of the application; and it is insisted that, with a provision therein to the effect that the answers to all questions shall be taken as warranties, the retention of the application by the insured bars recovery. We do not deem it necessary to go further in dealing with this claim than to say that, since the insured is to be treated as having dealt directly with the company when he signed the application, the insurer took it upon itself to make out the application and to answer the questions truthfully; hence it cannot transfer the results of its own misconduct to the innocent victim of its deception, who parted with his money in the belief, induced by defendant, that he was obtaining indemnity; nor can we hold that the insured was bound to suspect a dishonest purpose on the part of the insurer contrary to the dictates of good faith, and all rules of legal presumption, and hence required to institute an inspection of the policy upon its receipt to ascertain if he had been deceived. We have therefore reached the conclusion that, in construing the effect of the provisions referred to, the warranties of the insured must be treated as having been waived: *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89, 42 N. W. 208; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461, and note.

In the instructions to the jury, the court said that, if Otte died of consumption not produced by diabetes, then diabetes had nothing to do with his death. It is urged that this instruction was prejudicial, inasmuch as one of the proofs of death indicated that deceased died of tuberculosis (consumption). It was clear from the evidence that at the time of the application the insured did not have consumption or any disease of the lungs, and with reference to this testimony the court further said, among other things, that if consumption was the sole cause of the death of the insured, and it was not produced or caused by diabetes, then the verdict ⁴³¹ would be for the plaintiff, unless the jury found that Otte informed the agent of the company that he had diabetes, notwithstanding that disease might have run into consumption or caused consumption, but that if death was caused by diabetes, and the agent of the company was not informed by Otte that he had diabetes, then the plaintiff could not recover.

We think a fair and reasonable construction of the charge in these respects does not go further than that, if insured's death resulted from causes that were falsely represented to the defendant, plaintiff could not recover, but that if his death resulted from diabetes, and this information was given to the defendant by the insured, there might be a recovery if the latter correctly stated the facts to the solicitor, which is in accordance with the legal rights of the parties, as we have already held.

Order affirmed.

If an Insurance Agent makes out an application incorrectly, when the applicant has stated the facts correctly, the errors are chargeable to the insured, and the policy of insurance is binding on him, notwithstanding a stipulation in the contract that the agent represents the insured: See the monographic notes to Clark v. Union Mutual Fire Ins. Co., 77 Am. Dec. 724-726; Wheaton v. North British Fire Ins. Co., 9 Am. St. Rep. 232, 233; and the subsequent cases of Leonard v. State Mut. Life Assur. Co., 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698, and cases cited in the cross-reference note thereto. Compare O'Rourke v. Hancock etc. Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643, 50 Atl. 834.

BOYLE v. MUSSEY-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY.

[88 Minn. 456, 93 N. W. 520.]

GARNISHMENT Against Foreign Corporation.—A judgment obtained in and by a citizen of one state, against a corporation organized in another state, but regularly doing business in the former state though its agents cannot be attached or garnished in such other state in an action by a corporation of that state against the judgment creditor who has not been personally served with process in such suit and who has not voluntarily appeared therein. (p. 542.)

CONSTITUTIONAL LAW—Service by Publication.—The national constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, is applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and does not preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state to exercise authority over the person or the subject matter. Such constitutional provision does not apply to a judgment of the court of one state against a nonresident not personally served with process and who did not voluntarily appear therein. (p. 543.)

J. N. Searles, for the appellant.

Clapp & Macartney, for the respondent.

459 COLLINS, J. Writ of certiorari directed to one of the judges of the district court of Washington county. From the record it appears that the plaintiff is a citizen of the state of Minnesota, while the defendant is an Iowa corporation carrying on an extensive logging and lumbering business in the state of Minnesota, managed by an agent residing in Stillwater, and with a "public office" in that city; such agent being appointed and such office located in accordance with the provisions of Laws 1899, chapter 69. In an action between these parties arising out of a contract entered into in this state, judgment was entered on May 25, 1902, in the district court above mentioned, in favor of the plaintiff, Boyle, and against defendant company, for nearly nine thousand dollars. Four days after the entry of this judgment, the Standard Lumber Company, another Iowa corporation, commenced an action in the district court of that state, in which Boyle was named as defendant, to recover from him a sum in excess of fifteen hundred dollars, in which the plaintiff caused a writ to issue, directed to the sheriff of the county in which the suit was brought, and requiring him to attach Boyle's property, as a nonresident. The

sheriff, as auxiliary to the writ of attachment, and in accordance with a statute of the state of Iowa, garnished this defendant, solely on account of the Minnesota judgment; and thereupon plaintiff, as creditor, caused an execution to be issued on the judgment, ⁴⁶⁰ and placed in the hands of the sheriff of Washington county for service. It is admitted that, within the jurisdiction of this sheriff, the defendant, judgment debtor, had a large quantity of personal property subject to levy and sale, and that it was the intention of the sheriff to forthwith levy upon such property to satisfy the execution. This plaintiff has never been served in the state of Iowa with any notice or process of any kind in the action brought by the Standard Lumber Company, or in the garnishment proceedings, and has not appeared therein. This defendant then obtained an order requiring the plaintiff to show cause before the district court of the county in which his judgment was entered why all proceedings upon the execution should not be stayed until the determination of the garnishment proceedings and the action in the state of Iowa, or until, the defendant was released from any liability on account of the alleged garnishment. At the hearing this order to show cause was made absolute, and the sheriff was restrained from further proceeding with the execution.

We have a case, therefore, in which an execution has been issued to enforce the collection of a Minnesota judgment, obtained and entered on account of a Minnesota contract, against a debtor who, as a foreign corporation, is permitted to do business in this state solely because it has a resident agent appointed, and a public office fixed here, as required by statute, and by reason thereof is a resident of this state for all purposes connected with its Minnesota business; and the enforcement of that execution and the collection of this judgment have been indefinitely stayed in order to enable of foreign corporation, which has no office and does no business in this state, to collect a debt in a court of its own state against a citizen of Minnesota who is not within the jurisdiction of the court in which that action has been brought, has never appeared therein, and upon whom personal service of the process of that court cannot be made unless he should be found within its borders, the action last mentioned being wholly based upon an attempted seizure, through garnishee proceedings, of the Minnesota judgment, assignable and collectible in accordance with our own laws, and none other. The conclusion of the court below seems to have been based upon three cases: *Blair v. Hilgedick*, 45 ⁴⁶¹ Minn. 23, 47 N. W. 310; *Harvey*

v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. 905; Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944.

We fail to see where this court, in the decisions referred to, has laid down a rule which justified such a restraining order. In Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310, the main action and the garnishee proceedings were pending in the same court, and all the parties were residents of the same county, in this state. In Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. 905, the defendant corporation, also garnishee, was a resident of this state, and, for the purposes of an action in that state, was a resident of Montana, through which its road ran. The indebtedness garnished was incurred in Montana during the time the debtor was a resident of that state, but who had subsequently removed therefrom. In Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944, the creditor and the garnishee resided in this state, and the property involved was in litigation in the courts in this state. In the Harvey case, only, was there any question of jurisdiction.

The order involved cannot be upheld, and two cases in this state clearly indicate such a conclusion. In Swedish-American Nat. Bank v. Bleecker, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740, plaintiff, a resident of this state, brought an action here against a resident of North Dakota, garnished a foreign insurance company doing business in Minnesota, as well as in North Dakota, on account of a loss occurring in that state, and, publishing a summons in accordance with the laws of this state, claimed to have acquired jurisdiction over the defendant, and the right to subject the debt owing by the garnishee to the satisfaction of a debt due to him. It was held that as the creditor of the insurance company did not reside in Minnesota, nor was the company a Minnesota corporation, the proceedings would not lie. It was also held that, as between different states or sovereignties, the situs of a debt is at the domicile of the creditor, but, for the purposes of attachment or garnishment, the debt might also have a situs at the domicile of a debtor, and, further, that a creditor might by his voluntary act give the debt a situs at some place other than that of the creditor's domicile; but, said the court: "A third person claiming to be a creditor of such creditor cannot do this. Such a stranger has no power to change ⁴⁶² the situs of the debt, or to give it a situs at a place where it would not otherwise have it." That is just what the Standard company is attempting to do here.

In *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452, this subject was considered in a garnishment case, where none of the parties—the plaintiff, the defendant, or the garnishee, who was served with a summons while temporarily engaged in business within this state—were residents of Minnesota. We held that the proceedings could not be maintained. It was further said that the language used in the *Harvey* case to the effect that, for the purposes of attachment, a debt has a situs wherever the debtor can be found, and that it is not material that the debt is not payable in the state where the attachment proceedings are instituted, was clearly obiter. An examination of the *Harvey* case will show this statement to be correct. All of the cases in this state in which this topic had then been considered were reviewed in the *McKinney* case. Attention was called to the fact that an examination of the adjudicated cases would convince the reader that the courts have involved this subject in great confusion, and reference was made to an annotation by Mr. Freeman in 69 Am. St. Rep., at page 116 (*National Bank v. Furtick*, 2 Marv. (Del.) 35, 42 Atl. 479.) In some cases it has been held that a simple debt is subject to garnishment at the residence of the debtor—in other words, that his residence is the situs thereof for the purpose of jurisdiction in attachment and garnishment cases. This rule has often been modified in various ways as difficult conditions were presented. It has been held not applicable where the debt was expressly made payable in another state.

Much may depend upon the statutes under which the proceedings are pending, but the doctrine that the situs of the debt for the purposes of garnishment or attachment is at the residence of the debtor has been distinctly repudiated in many courts, and it has been held that the situs of a debt for the purpose of seizure is only at the domicile of the creditor. As expressly said in one case, if there is nothing but an indebtedness, there is no property at the residence of the debtor, but, rather, an absence of property. This doctrine applies with peculiar force to judgments entered and docketed in another state. In this state a judgment, under our ⁴⁶³ statute, is not subject to garnishment so long as an execution may be issued upon it; but, if the order now before us is upheld, that statute is annulled. There is no rule of law which compels, and no consideration of policy or comity which would or ought to induce, a court of this state to suspend its process, and to prohibit one of its own citizens from collecting a judgment of our own court upon

the ground that after its recovery an attempt has been made to subject it to the jurisdiction of a court of another state: *Shinn v. Zimmerman*, 23 N. J. L. 150, 60 Am. Dec. 260, with annotations. In Colorado it has been decided that a judgment debtor cannot be held under garnishee process issued from any other court than that in which the judgment is entered: *Hamill v. Peck*, 11 Colo. App. 1, 52 Pac. 216. See, also, *Wallace v. McConnell*, 13 Pet. 136; *American etc. Bank v. Rollins*, 99 Mass. 313.

A judgment of a court of this state has no situs in another state, and the only claim here that it has is because the debtor resides in that state, and the judgment itself has therefore been brought into it by legislation. If this judgment had no situs within the state of Iowa, in the absence of legislation, any statute attempting to give it situs in that state, or to prescribe a manner of service of process, except personal within its borders, on either the debtor or the nonresident creditor, by which jurisdiction over it might be acquired, would be as nugatory and ineffectual to dispose of the creditor's property in the judgment as would be legislation attempting to acquire jurisdiction over tangible property situated outside the state of Iowa. The subject matter of such legislation, namely, the property over which it attempts to acquire jurisdiction, is entirely beyond the power and control of the legislature or the courts of that state.

"The right of a state to inquire into the obligations of a nonresident, and its jurisdiction to attach his property to answer for such obligations, is founded solely on the fact that each state has exclusive control and jurisdiction over the property situated within its territorial limits, and the inquiry can be carried only to the extent necessary to control the disposition of such property. If there be no personal service on the defendant or owner of the property, or appearance by him, the jurisdiction cannot extend ⁴⁶⁴ beyond binding the property attached or effects garnished. Consequently, if the nonresident has no property within the state, and there has been no personal service on him within the state, or voluntary appearance by him, there is nothing upon which its tribunals can adjudicate; and any judgment rendered under such circumstances, whether affecting the person only, or the property also, would be void for want of jurisdiction of the person and of the subject matter": *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825. See, also, *Illinois etc. R. R. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651, 12 South. 461, in which the question is ably dis-

cussed; also annotations to these cases in 19 L. R. A. 577, and 41 L. R. A. 331.

The judgment in question exists under and by virtue of the laws of this state. It can have no situs elsewhere, except as the creditor may voluntarily give it that situs. The Standard Lumber Company, a stranger to it, cannot give it a situs in the state of Iowa by bringing an action and attempting to seize it there. For all the purposes of that judgment, the debtor has and had its domicile in this state as effectually and conclusively as if it had been incorporated under our laws, and not under the laws of the state of Iowa. Should the question now before us be presented to the Iowa courts in the action brought against the judgment creditor, we have every reason to believe that such courts would agree with us. But if that should not be the result, it would simply be "another illustration of liability to hardship, now and then, to litigants, growing out of conflict of laws in different jurisdictions."

Defendant's counsel argues that at this time we should give "full faith and credit" to the proceedings instituted in the Iowa court. A complete answer to this contention is found in the opinion from which we have heretofore quoted, as follows: "Adhering to this respect to the situs of the debt due from appellant to appellee, we are constrained by the decisions of the supreme court of the United States, cited above, to hold that the judgment of the Tennessee court, operating, as it did, on its face to condemn and divest appellee's property in the debt, over which it had not acquired jurisdiction by personal service within the state on appellee, or by his voluntary appearance, was without due process of law, and absolutely void, for want of jurisdiction of the res, the ⁴⁶⁵ debt, or of the person of its owner. To such judgments the constitution of the United States does not require that any faith and credit be given; the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the act of Congress providing for the mode of authenticating such acts, records, and proceedings being now construed as applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter: *Pennoyer v. Neff*, 95 U. S. 714"; *Louisville v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825.

The order of the court below is reversed, and all proceedings had upon the order to show cause are annulled.

The Courts of One State cannot acquire jurisdiction to attach and condemn a debt due to a nonresident and payable in the state of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the state of suit on the creditor, or his voluntary appearance. The full faith and credit clause of the federal constitution does not apply to a judgment in proceedings to garnish a debt due to a nonresident which is void because there was no personal service on the defendant within the state, or voluntary appearance by him: *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825. See, generally, on the situs of debts for purposes of garnishment, the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113-127; and the subsequent cases of *Kansas City etc. Ry. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 206, 63 S. W. 996; *McKinney v. Mills*, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278, and cases cited in the cross-reference note thereto. On the garnishment of foreign corporations, see the monographic note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 924, 925.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LAYSON v. COOPER.

[174 Mo. 211, 73 S. W. 472.]

CHATTEL MORTGAGOR Estopped to Deny Ownership of Property.—A mortgagor of chattels, if he knew the contents of the instrument executed or was not deceived into signing it, cannot, in replevin for the property, be permitted to say that it did not belong to him. (p. 549.)

REPLEVIN—Title in Third Person as a Defense.—The rule that a defendant in replevin may show title in a third person, if it goes to disprove the plaintiff's claim, does not apply when the plaintiff claims under a deed from the defendant alone. (p. 550.)

CHATTEL MORTGAGOR—Evidence that Property did not Belong to.—If a chattel mortgagor, in replevin for the property, tenders the issue that the deed was obtained from him by a fraudulent concealment of the fact that it purported to cover the property, and that he was ignorant of the fact when he signed the document, he may show that the property did not belong to him. (p. 550.)

WITNESSES.—A Wife is not Competent to Testify, in replevin against her husband alone, that the property belongs to her. (p. 552.)

Salle & Crossan and Wanamaker & Barlow, for the appellant.

J. C. Wilson and Perry & Lyons, for the respondents.

216 VALLIANT, J. This is an action of replevin for one hundred and seventy-eight bushels of corn; the corn was taken under the writ and delivered to plaintiff.

The suit was begun in a justice's court, carried by appeal to the circuit court, where there was a judgment for defendant, from which the plaintiff appealed to the Kansas City court of appeals, where the judgment of the circuit court was affirmed, but one of the judges of the Kansas City court of appeals being

of the opinion that that decision was in conflict with the decision of the St. Louis court of appeals in *Brinsmade v. Groll*, 14 Mo. App. 444, the cause was certified to this court.

The plaintiff's evidence tended to prove the following: Plaintiff was the owner of a farm which he rented for the year 1897 to one Oliver, reserving a rent of twenty-five dollars to be paid him for the use of the pasture, and two-fifths of the crops. The lease recited that Oliver owed the plaintiff sixty-five dollars on a note, and that Oliver's three-fifths of the crops to be raised were to stand good for the payment to plaintiff of the twenty-five dollars rent for pasture and the sixty-five dollar note. It also recited that the plaintiff sold to Oliver two mares on the farm, but the title was to remain in plaintiff until he was paid for the same.

In June of that year plaintiff sold the farm, including his two-fifths interest in the growing crop, to Eliza K. Cooper, wife of the defendant. Soon after the purchase Cooper and wife bought out the tenant's interest and moved on the farm. Plaintiff's evidence is not ²¹⁷ clear as to whether it was Cooper or his wife that bought the tenant's interest, but he testified that both of them knew what his contract with Oliver was. His testimony was that Mrs. Cooper told him that "they," meaning herself and husband, had bought the growing crop and the mares of Oliver. Shortly after defendant Cooper and his wife moved on the farm, he executed the paper writing under which the plaintiff claims, by which the three-fifths of the crop bought from Oliver and one of the mares (the other having died) and a horse of Cooper's are in effect mortgaged to plaintiff to secure a note of Cooper's for one hundred and two dollars and thirty-two cents, which sum is made up of the twenty-five dollars rent, the sixty-five dollar note of Oliver to plaintiff, and another small item of debt of Oliver to plaintiff assumed by Cooper. The one hundred and two dollars and thirty-two cents note was not paid at maturity and this suit is to gain possession of the mortgaged property.

On the part of the defendant the testimony tended to show that he did not purchase the corn from Oliver, but that it was purchased by his wife and paid for with her money, and that he never made any claim to it. That he purchased the horses from Oliver and assumed to pay Oliver's debt to the plaintiff. That he signed the paper under which the plaintiff claims, but did not know at the time he signed it that it contained anything in relation to corn. He understood that it covered only the horses. He testified that he could read

very little and that the mortgage was written by the plaintiff who pretended to read it to him, but in doing so omitted all that there is in it in reference to the corn. He trusted to the plaintiff's reading it correctly and signed it without reading it himself. (Plaintiff testified that he did not read the contract to defendant at all; that defendant read it himself and then signed it.)

Oliver as a witness for defendant testified that he sold his share of the crop to Mrs. Cooper; the agreement was that she was to pay his debt to the plaintiff and give him one hundred dollars. Her husband handed him the money; he did ^{not} know where he got it. The horses were also included in the sale. He told Mrs. Cooper what his obligation to the plaintiff was and she agreed to step into his shoes. "Then I turned the crop over to her subject to the mortgage I had given on the three-fifths interest and on the horses to Mr. Layson. This was all in one contract, I didn't have two separate contracts with them. I declined to sell the corn unless they would take it subject to the lien on the crop and horses, unless they would take it all and take it subject to that lien. I made that trade with Mrs. Cooper."

Mrs. Cooper, wife of defendant, was called as a witness in his behalf. Plaintiff objected to her as a witness on the ground that she was the wife of the defendant and therefore incompetent; the objection was overruled and plaintiff saved an exception. She testified that when she bought the farm from the plaintiff and his two-fifths of the growing crop, he told her that she could buy from Oliver, the tenant, his three-fifths and that she did so. That she paid Oliver with money that she borrowed on a mortgage of other property belonging to her; that she did not know when she bought from Oliver that plaintiff had a written contract with him; that the mortgage executed by her husband, under which plaintiff claims, was executed without her knowledge or consent.

The plaintiff asked instructions to the effect that the paper contract between defendant and plaintiff, together with the written contract of lease between plaintiff and Oliver, constituted a mortgage, and if the note secured by the mortgage was not paid plaintiff was entitled to recover; that defendant was estopped to deny his title to the property covered by the mortgage, and that though the jury should find that defendant's wife bought the corn of Oliver, yet if she bought it with the knowledge that plaintiff had a lien on it under his contract with Oliver, still

the plaintiff was entitled to recover. The court refused those instructions, but gave ²¹⁹ the case to the jury under instructions of its own, which were to the effect that if the defendant's wife bought the corn from Oliver under agreement with him that she was to pay his debt to plaintiff as part of the consideration, and that the document in evidence executed by defendant to plaintiff was executed with her knowledge and consent, and the note therein mentioned was unpaid, the plaintiff was entitled to recover; that under those circumstances defendant and his wife were estopped to deny his title to the property mentioned in the mortgage. And at the request of the defendant the court gave instructions to the effect that the burden was on the plaintiff to show that he was the owner and entitled to the possession of the property in controversy, and unless he did so the verdict should be for defendant; also that if plaintiff told defendant's wife, when he sold her the land, that she could buy Oliver's interest in the crop, and she did so and paid for it with her own means and informed the plaintiff of what she had done before he took the note and mortgage from defendant, then the verdict should be for defendant unless the jury should find that the defendant executed the note and mortgage with the knowledge and consent of his wife. Also that if defendant was, by lack of education, unable to read the contract and requested plaintiff to read it to him, and plaintiff, pretending to do so, failed to read what was in the document in regard to the corn or to inform the defendant that the corn was included in it, and defendant signed it in ignorance that it purported to cover the corn, it was a fraud on the part of the plaintiff and rendered the contract void and the verdict should be for defendant. Also, that if the corn belonged to defendant's wife, and she bought it with the knowledge and direction or consent of plaintiff and paid for it with her own means, the verdict should be for defendant unless the jury should find that the mortgage given by her husband was given with her knowledge and consent.

²²⁰ The verdict was in this form: "We, the jury, find for the defendants." The judgment was: "It is therefore considered, ordered and adjudged by the court that plaintiff take nothing by his writ, that the defendants go hence without day and that the costs of this suit, taxed at eighty dollars and sixty-five cents, be adjudged against plaintiff and hereof let execution issue."

The suit having originated in a court of a justice of the peace, no written plea was required of defendant and he filed none, but at the trial he made defense on two grounds: 1. That his

signature to the mortgage was obtained by fraud; 2. That the property mortgaged did not belong to him. The first was a legitimate defense; the second was not. If he was really illiterate, or could not read the document and was dependent on the plaintiff for a knowledge of its contents, and plaintiff pretended to read it to him, but concealed the fact that it covered the corn and induced him to believe that it related only to the horses, then there was no legal execution of the document. In such case the defense may be made in an action at law: *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 368, 45 Am. St. Rep. 556, 27 S. W. 648. There was some evidence on the part of defendant tending to prove that defense, and therefore the court was justified in submitting it to the jury. And because the instructions asked by the plaintiff to the effect that defendant was estopped by his deed to deny that the corn belonged to him, ignored the question whether he had been so deceived into signing the paper, they were properly refused. But the court should have instructed the jury that the defendant was estopped to deny that he owned the corn unless they found from the evidence that he was so deceived, the burden of proving which was on him, and unless sustained the verdict should be for the plaintiff.

If the defendant executed the paper knowing its contents, or if he was not deceived or misled into signing it by the fraudulent conduct of the plaintiff, he is ²²¹ bound by it, and the court will not listen to him saying that the property did not belong to him.

By giving the mortgage on the corn the defendant declared in the most solemn manner that it was his property, and unless he was deceived, as he says he was, into signing it, he deceived the plaintiff by that act, and the law will not allow him to profit by it. It is no new doctrine that a man is estopped to deny the truth of his own assertion when another has accepted it as true and acted upon it.

As above said, that was the only legitimate defense offered in the case, but it was not the one on which the defendant chiefly relied. The case seemed to turn chiefly on the question of whether or not the mortgaged property belonged to the defendant.

The fact, if it was the fact, that the corn really belonged to defendant's wife, was no defense in this case; she was not a party to the suit, her title was not in question, and the judgment, whatever it might be, would not be binding on her. If the mortgage was the free act and deed of the defendant, then, as against him, the plaintiff was entitled to the possession of

the corn, even though it did not belong to him. Of course, he could not mortgage his wife's property, nor could her rights be impaired by a judgment in a suit against him alone. She is not a party to this suit, and was free to assert her rights in whatever form she might have been advised was best, against both plaintiff and defendant. Whilst the plaintiff by his writ could take the property out of the possession of the defendant, yet if it really belonged to the defendant's wife, she by her writ could have taken it from the plaintiff or have otherwise had redress for the injury. But the defendant was not entitled to defend this suit against his own deed on the ground that the property did not belong to him. The rule that a defendant in a replevin suit may show title in a third person, if it goes to disprove the plaintiff's ~~222~~ claim, does not apply when the plaintiff claims under a deed from defendant himself.

The instructions, therefore, that were given embodying the theory that if the corn belonged to the defendant's wife the plaintiff could not recover unless the mortgage was executed with her knowledge and consent, were erroneous. The defendant on the trial made no demand for the return of the property, and although the verdict and judgment were in his favor, yet there was no award of the value of the property, nor of damages for its detention, nor was there any order for its return to him; it was only a general verdict in his favor, and a judgment that he go without day and recover his costs, leaving the property in the possession of the plaintiff; at least, that is the aspect of the case as shown by the abstract before us. The defendant seems to have successfully defended the suit against his own deed on the theory that the property he had mortgaged did not belong to him. He had no right to a judgment in his favor on that theory.

Although the wife's title was not directly involved in the suit, and defendant could not avoid his own deed by showing that he mortgaged property that did not belong to him, yet when he tendered the issue that the deed was obtained from him by fraudulent concealment of the fact that it purported to cover the corn, and that he was ignorant of the fact when he signed the document, he was entitled to show if he could, as a circumstance bearing on that issue, that the property did not belong to him. That was a collateral fact, if it was a fact, that was proper for the jury to consider, along with the other conflicting evidence bearing on the issue relating to the due execution of the mortgage, therefore evidence on that point was relevant. This brings

us to a consideration of the question, Was the wife of defendant a competent witness in his behalf?

It was because of that question that this cause was certified to this court by the Kansas City court of appeals. ²²³ That court holding in this case, and in a former decision in a like case (*Toovey v. Baxter*, 59 Mo. App. 470), that she was a competent witness, while the St. Louis court of appeals, in *Brinsmade v. Groll*, 14 Mo. App. 444, held the contrary.

It is not contended that in such case at common law the wife would be a competent witness. Our statute on the subject is an enabling act making persons competent under certain conditions who at common law under like conditions were incompetent witnesses.

Section 4656 of the Revised Statutes of 1899 prescribes the conditions under which a married woman may testify in a suit in which her husband is a party, whether she be joined therein as a party or not. Among the conditions there prescribed is not included the fact of her interest in the property when her interest is not the subject of adjudication in the case, but only a collateral circumstance. If the wife is a party to the suit and has a real interest in the subject which would be affected by the judgment, then she is a competent witness, by the terms of section 4652 of the Revised Statutes of 1899, whether her husband is joined as a party with her or not. But although she may be the real owner of the property in controversy, if she be not a party to the suit and is not bound by the judgment, she is not a competent witness in behalf of her husband. The decision of the St. Louis court of appeals, in *Brinsmade v. Groll*, 14 Mo. App. 444, lays down the correct rule on that subject.

This court has in a number of cases said that where the wife was the real party in interest she is a competent witness, notwithstanding her husband is a party to the suit, and that where the husband is the real party in interest he may testify, although his wife is also a party: *Scrutchfield v. Sauter*, 119 Mo. 624; *McKee v. Spiro*, 107 Mo. 452, 17 S. W. 1013; *Brownlee v. Fenwick*, 103 Mo. 420, 15 S. W. 611; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225; *Steffen v. Bauer*, 70 Mo. 399; *Wilcox v. Todd*, 64 Mo. 388; *Quade v. Fisher*, 63 Mo. 325; *Harriman v. Stowe*, 57 Mo. 93; *Owen v. Brockschmidt*, ²²⁴ 54 Mo. 285; *Buck v. Ashbrook*, 51 Mo. 539; *Fugate v. Pierce*, 49 Mo. 441; *Tingley v. Cowgill*, 48 Mo. 291; *Hardy v. Matthews*, 42 Mo. 406. But in all of those cases the husband or the wife whose competency as a witness was in question was a party to the suit

and had a material interest in the judgment to be rendered. It was held that in such case the wife was a competent witness under section 4652, which removes the common-law disability of interest. This court has never held that a wife was a competent witness for her husband in a suit by or against him, in which she was not also a party and interested in the subject of the suit.

Something is said about the wife in this case being the agent of her husband in the matter about which she testified, and therefore competent. But she was not offered as a witness on any such theory, and in fact both her testimony and that of her husband shows that she was acting in her own right and not as agent for her husband.

We hold that the wife of the defendant was not competent as a witness for him in this case.

The judgment is reversed and the cause remanded to be retried according to the law as herein declared.

Robinson, J., concurs.

Marshall, J., concurs in the result.

Brace, P. J., absent.

When Replevin is sustainable is the subject of a monographic note to *Sinnott v. Feiock*, 80 Am. St. Rep. 741-767. Property in a stranger is pleadable in the action: *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131.

On Fraud in Obtaining the Execution of an instrument by misrepresentation or concealment of its contents, see *Keller v. Ruppold*, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364; *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489; *Beck v. Pauli Lith. Co. v. Houppert*, 104 Ala. 503, 53 Am. St. Rep. 77, 16 South. 522; note to *McArthur v. Johnson*, 93 Am. Dec. 596, 597.

McGINNIS v. MISSOURI CAR AND FOUNDRY CO.

[174 Mo. 225, 73 S. W. 586.]

COMITY.—The Statutes of One State are Enforced in another as a matter of comity, and never when inconsistent with the policy of its laws. (p. 557.)

DEATH—Divisibility of Action for—Conflict of Law.—A statute creating a liability for wrongful death, and designating the person who may enforce it, is indivisible, so that the liability cannot be enforced in another state by a person not designated in the statute. (p. 558.)

DEATH—Who may Sue for—Conflict of Law.—Under the Illinois statute no one but the personal representative can maintain an action for wrongful death, and that representative cannot maintain an action in Missouri for a death occurring in Illinois. (p. 558.)

DEATH—Who may Sue for—Conflict of Law.—The Legislature cannot Authorize a person to enforce in the courts of the state a liability for wrongful death created by the laws of another state, when such person has no right to enforce such liability in the courts of the latter state, for such a law would be tantamount to an extraterritorial enactment. (p. 559.)

Seddon & Blair and Robert A. Holland, Jr., for the appellant.

Kinealy & Kinealy, for the respondent.

227 MARSHALL, J. This is an action for damages for personal injuries to Daniel Callahan, on December 27, 1898, at the town of Madison, Illinois, which resulted in his immediate death. The deceased was an employé of the defendant. The negligence charged is that the defendant allowed the electric wires, by which its building at Madison, Illinois, was lighted, to come in contact with the shift wires that the deceased had to catch hold of in the course of his duties, which gave the deceased an electric shock that caused his death. The answer is a general denial, and a special plea that McGinnis has no right to maintain this action. The injury and death occurred in the state of Illinois, and the right of action is predicated upon a law of that state (Starr & Curtis' Annotated Statutes of Illinois, c. 70, pars. 1, 2, pp. 2155-2156), whilst the action is brought in this state under the act of 1891 (now Rev. Stats. 1899, sec. 548), and as the case at bar hinges entirely upon a construction of the statutes, they are set out in full.

The Illinois statute is as follows:

"Par. 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party

injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Par. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the ²²⁸ proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided, that every such action shall be commenced within two years after the death of such person."

The statute of this state is as follows:

"Sec. 548. Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such causes of action are not authorized by the laws of such state or territory to prosecute such action in his, her or their own names, then, in every such case, such cause of action may be brought in any of the courts of this state, by a person to be appointed for that purpose by the court in which such cause of action is sought to be instituted, or the clerk thereof in vacation, and such person so appointed may institute such action and prosecute the same for the benefit of the person or persons entitled to the proceeds thereof under the laws of the state or territory wherein the cause of action arose."

Before the institution of this suit, Delia Callahan, the widow of the deceased, filed a petition asking the appointment of McGinnis under the section of the statute quoted; and the appointment was duly made.

There was a direct and sharp conflict in the evidence on the question of the cause of the accident and likewise as to whether the deceased received any such injuries as are alleged, or whether he died from heart disease. But as no point is made by the defendant, in this court, with respect to any question except the

right of McGinnis to maintain this action, it is unnecessary to refer to any other branch of the case. There was a verdict and judgment for the plaintiff for one thousand dollars, and the defendant appealed.

²²⁹ The contention of the defendant is that no right of action in a case like this existed at common law; that the right is purely statutory; that the state of Illinois created the right and prescribed who should bring the suit, and how the proceeds should be distributed; that the statute of Missouri has no extraterritorial force and could not authorize a right created by the laws of Illinois to be enforced by anyone else than the person who is authorized by the laws of Illinois to enforce it, and therefore McGinnis has no right to maintain this action.

Vawter v. Missouri Pac. Ry. Co., 84 Mo. 679, 54 Am. Rep. 105, was an action for damages based upon the statute of Kansas, which is substantially like the Illinois statute, and which prescribed that the administrator should bring the action. The plaintiff was appointed administratrix in this state. It was held that she could not maintain the action; that the laws of this state expressly deny to an administrator a right to maintain such an action; that the Kansas administrator could not maintain such an action here, because he has no extraterritorial rights.

In *Oates v. Union Pac. Ry. Co.*, 104 Mo. 514, 24 Am. St. Rep. 348, 16 S. W. 487, the widow brought the action. The accident occurred in Kansas. It was held that the cause of action was created by the statute of Kansas, and that statute which created the right prescribed who should enforce the right, to wit, the personal representative, and that no other person could maintain the action.

In the *Vawter* case it was noted that the St. Louis court of appeals (*Stoeckman v. Terre Haute etc. R. R. Co.*, 15 Mo. App. 503), the New York courts (*Leonard v. Columbia etc. Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491), and the supreme court of the United States (*Dennick v. Railroad Co.*, 103 U. S. 11), had held that a personal representative appointed in the state where the action was brought, could maintain an action based upon such a statute of another state—the reasoning employed in those cases being that the foreign statute created the right and prescribed that the personal representative should bring the suit, but ²³⁰ the right thus created was transitory, and the statute did not say the suit should be brought by an administrator appointed in the state that created the right, and therefore an

administrator appointed in the state where the suit was brought filled the requirements of the statute. But it was held that those cases were not supported by the weight of authority, and the reasoning employed therein could not apply in this state, because our law expressly prohibited an administrator from maintaining an action of that nature, and the laws of no foreign state could confer upon a Missouri administrator a power that is expressly denied him by the laws of the state. The matter was summed up by the court, in that case, as follows: "Most courts and text-writers of acknowledged authority hold that these actions, given by statute for causing death by neglect, default, or a wrongful act, can only be enforced by the courts of the jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory, and enforce the statute law of the state where the injury was suffered, though the action be not one of any general recognized right. Others again entertain such actions when the laws of the two states upon the same subject are similar. If these statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity. Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, i. e., to say to an administrator, you may sue in the county of the state of your appointment, under the law of another state, when denied the right to bring the same, or a like suit, by the laws of the state conferring the appointment."

Other states have adopted the rule that prevails in this state, and held that: "The right of action to recover damages for injuries resulting in the death of the person being entirely statutory, the action must be brought in the name of the person to whom the right ²³¹ is given by the statutes of the state where the injuries are inflicted": *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863, 17 Atl. 597; *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244; *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46, 26 Am. Rep. 742.

But it is contended that the courts of Illinois hold that the law of that state, touching this question, is divisible; that the first paragraph creates the right, while the second paragraph prescribes who shall bring the suit (*City of Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553), and, therefore, it is argued that the right being transitory and divisible from the remedy, it

may be enforced in this state by an agency or person other than that required by the laws of that state. It must be noted, however, that the case of *City of Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553, was an action in the courts of Illinois, by an administrator to enforce a right created by the laws of that state. So that the question here involved was not decided in that case, nor would it be at all controlling authority in this case if it had been expressly decided, for, manifestly, neither the legislature nor the courts of one state can give jurisdiction to the courts of another state, nor dictate to those courts what statutory rights it shall recognize, or who shall be the proper party to enforce them. Purely statutory laws of one state are enforced in other states simply as a matter of comity, and are never enforced where they are inconsistent with the policy of the state where they are sought to be recognized.

It is manifest that an Illinois administrator could not maintain this suit in this state without express authority from this state. If suit had been begun in Illinois, it could be maintained, under the statute of that state, only by an administrator appointed by the courts of that state. The first paragraph of the section of the statute of Illinois cited creates a liability on the part of the person or company or corporation that caused the ²³² injury, but that paragraph does not create a right of action in favor of anyone. If this paragraph stood alone it would not afford the basis for any civil action whatever. The Illinois court (*City of Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553), construing this paragraph, said: "This is a new cause of action given by this statute, and unknown to the common law, and should not be extended beyond the fair import of the language used." Thus the court held that the first paragraph created a new cause of action, notwithstanding that paragraph of the statute only relates to the liability of the defendant. Metaphysically it might be said that where there is a liability on the part of a defendant there must be a right in someone to enforce the liability. But, however this right may be, if it was a matter of general liability, it cannot be true where the liability is a liability that was unknown to the common law and depends for its existence upon a statute. In such a case the statute creating the liability must confer upon a specified person the right to enforce the liability. Unless it does so, no one can enforce it, because no one has a right under the general common law to do so. When, therefore, a statute creates a liability and prescribes the person who shall have the right to en-

force it, the two parts of the statute are component parts of the whole, and both are necessary to constitute the whole, and it must be done exactly in the manner and by the persons or agencies that the statute prescribes. There can be no equivalent or other means employed. Without the construction placed upon the statute by the courts of Illinois, it would seem quite evident that the first paragraph creates a liability, while the second paragraph confers a right of action upon the personal representative of the deceased, and that the two are not divisible, but are necessary parts to make the right complete.

But, however this may be, it still remains that under any construction that may be put upon the Illinois statute, no one but the administrator can maintain the action, ²³³ and that administrator cannot maintain the action in this state.

This naturally brings us to a consideration of the section of the statute of this state (Rev. Stats. 1899, sec. 548) which authorizes the court to appoint some person in this state to bring the action for the benefit of the persons who are not allowed by the laws of the state that created the liability and the right of action, to sue in their own name, and which it is said was enacted because of the decisions of this court that neither the foreign administrator, nor an administrator appointed under the laws of this state, nor the widow or next of kin could maintain an action therefor. It seems probable that such was the origin of this statute. But what is its legality and effect?

The accident occurred in Illinois. Without the statute of that state, there would be no liability or cause of action anywhere or in favor of anyone, no matter what might be the law of this or any other state in reference to similar accidents that happened here or there. In short, the whole matter depends upon the Illinois statute. That statute confers a right of action upon the administrator, and not upon the widow or next of kin. It is for their benefit, but they cannot maintain an action therefor. Our statute attempts to enforce the liability created by the statute of Illinois, not through the person who alone is given the right under the Illinois law to enforce it, but through a person who would have no right to enforce the liability in that state.

And with this result: Under the Illinois law the administrator could sue in that state to recover damages for the accident that occurred in that state, and at the same time under the statute of this state (sec. 548) the person appointed by the court could maintain a suit in this state to recover the damages for the identical accident, and neither suit could be pleaded in abate-

ment of the other, and a recovery in one would be no bar to a recovery in the other, for the reason that each would ²⁸⁴ have a cause of action conferred upon him by the law of his state.

This demonstrates the infirmity that underlies a construction of the statute which holds the Illinois statutes to be divisible, and therefore holds that the cause of action is transitory while the person who is to enforce the right must be determined by the *lex fori*.

As pointed out, it takes both paragraphs of the Illinois law to support the action in that state, and it is incongruous to say that a vital, component part can be segregated from the entity of which it is a necessary part, and be transplanted into the laws of another state while the entity is incapable of being so transplanted or enforced. Nor can such a component part be transplanted and be grafted on to or supplemented by a law of such other state so as to make the two parts, dependent for their existence upon separate sovereign wills, a complete and valid law. For no state has any power to create a liability for an act done beyond its territorial limits, and then to appoint any person to enforce such a liability in its own courts, or in the courts of any state. A liability or a cause of action that does not exist under the common law can only be created by the law-making power of a sovereign state, or of the United States in proper cases. And when the laws of the creating state prescribe the person who shall enforce the right, no other person in that or any other state can enforce it. The law must be enforced as written or not at all. It cannot be partitioned, and some of its parts transplanted to another state and added to or be supplemented by the laws of that state.

The legislature of this state had no power to create a liability or preserve a right of action for an act done in Illinois, and it had no power to authorize anyone here to enforce, in the courts of this state, a liability, or to assert a right, that is created by the laws of Illinois, when such a person would have no right to enforce such liability or assert such a right in the courts of Illinois. ²⁸⁵ And this is manifestly true, because such a law a law would be tantamount to an extraterritorial enactment.

And what is here said is not at all in conflict with what was said by the supreme court of the United States in *Dennick v. Railroad Co.*, 103 U. S. 11. But if it was so in conflict, it would not change the result, for this court expressly referred to that case and refused to follow the rule there laid down, in *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 684, 54 Am. Rep. 105, and

as there is no federal right involved, a decision of that court is not necessarily conclusive in construing a state statute.

For these reasons it is clear that the plaintiff has no legal capacity to maintain this action, and that section 548 of the Revised Statutes of 1899 is void and without legal force.

It would have been within the power of the legislature, however, to confer express power upon the Illinois administrator to maintain an action, based upon the statute of the state quoted, in the courts of this state, for that would be a mere matter of state comity and not the creation of a new liability and right.

The judgment of the circuit court is therefore reversed.

All concur.

The Right of Action for Death by wrongful act in another state is discussed in the monographic notes to *Attrill v. Huntington*, 14 Am. St. Rep. 353-355; *Gray v. Telegraph Co.*, 91 Am. St. Rep. 726, 727; and the case of *Wabash R. R. Co. v. Fox*, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739, and authorities cited in the cross-reference note thereto. That a cause of action for personal injuries is transitory, see *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 78 Am. St. Rep. 390, 27 South. 851; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664; but that statutes giving a right of action for personal injuries have no extraterritorial force and effect, see *Baltimore etc. Ry. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 293, 62 N. E. 488.

The Doctrine of Comity is discussed in the recent case of *People v. Martin*, 175 N. Y. 515, 67 N. E. 589, 96 Am. St. Rep. 628, and cases cited in the cross-reference note thereto.

FETTER v. FIDELITY AND CASUALTY COMPANY.

[174 Mo. 256, 73 S. W. 592.]

ACCIDENT INSURANCE—Death from Disease and Accident. If an accident ruptures a kidney, and the resulting hemorrhage causes the death of the insured, the fact that a cancer in the organ is a predisposing cause of the hemorrhage does not prevent the death from being the result of an accident "independent of all other causes." (p. 567.)

ACCIDENT INSURANCE—Remote and Proximate Causes.—The "causes" referred to in a policy insuring against injuries sustained by accident "independent of all other causes," are the proximate or direct, not the remote, causes of death. (p. 568.)

ACCIDENT INSURANCE—Proof of Accident.—When, in an action on an accident insurance policy, the plaintiff introduces evidence tending to show that the insured died of hemorrhage resulting from an accidental fall, a prima facie case is made out, and it is not necessary to take up the defendant's side and prove that death did not result from the excepted causes named in the policy. (p. 569.)

Harkless, O'Grady & Crysler, for the appellant.

Ashley, Gilbert & Dunn, for the respondents.

~~258~~ VALLIANT, J. Appeal from a judgment of the circuit court of Jackson county in favor of plaintiffs founded on two accident insurance policies issued by defendant on the life of plaintiff's father.

The petition is in two counts. In the first it is averred that the defendant issued it policy February 21, 1892, whereby it insured the life of plaintiffs' father against bodily injuries sustained through external, violent and accidental means and agreed to pay plaintiffs five thousand dollars if death should result to their father from such injuries, independent of all other causes, within ninety days from the date of the infliction of such injuries. It then goes on to state in detail the accident which, it alleges, caused the death of their father within less than thirty days from the date of its occurrence. The second count is in form substantially like the first, based on another policy issued November 18, 1893, for six thousand dollars. The answer of defendant was a general denial and a special plea that the insured died a natural death, resulting from a diseased kidney. Reply, general denial.

The evidence on the part of the plaintiffs tended to show that W. J. Fetter, their father, whom we will hereinafter call the insured, was past sixty-nine years of age. August 6, 1899, he was at his office, and about five in the afternoon, preparatory to leaving, he and his son, who was with him, attempted to close a window, the upper sash of which had been let down. The sash did not move smoothly, therefore each of them took a window pole, which was designed for the purpose, ~~259~~ and inserting one end under the upper rim of the sash, endeavored to push it in place. But it seemed to be stuck, and required hard pushing to move it. In this effort the upper end of the stick held by the insured slipped off the rim, and the sudden release of its hold had the effect to throw the insured upon his right side against the edge of a table that was in place at the window, designed to hold maps and drawings to be used by one standing, and therefore tall enough to strike the insured high on the side. He immediately dropped the stick, turned pale and groaned. In a few minutes afterward he went home; he was looking tired and pale when he arrived; he took a light repast and went to bed. During the night he passed blood in his urine, and very early in the morning he sought his family physician, Dr. Porter, but

did not see him. He returned home about 7:30 o'clock, pale and suffering. His physician came and found him suffering pain in the right kidney and passing blood in his urine. August 13th he was taken to St. Joseph's hospital, where an exploratory examination was made by Dr. Binnie, assisted by Drs. Porter and Shy; incision was made in the back, and Dr. Binnie introduced his fingers into the pelvis of the kidney, but found nothing abnormal except the rupture and an enlargement. The patient rallied from the operation and the wound healed from the inside, but the hemorrhage continued as before until his death, which occurred September 2, 1899, less than thirty days from the occurrence of the accident. He died from hemorrhage, from loss of blood. The autopsy, held September 4th, revealed a normal left kidney. The right kidney revealed a rupture, and the lower end of that kidney was cancerous, harder than the normal part, and less vascular, that is, less full of arteries and veins that would bleed. The rupture found in the kidney was between the normal and the cancerous parts, or into the healthy tissue; the hemorrhages were from the rupture, and the ²⁶⁰ hemorrhages caused the death. Before the accident the insured was an active, spare, hardworking man, past sixty-nine years, engaged in the business of fire insurance; he was in good health, having had no hard spell of sickness within the memory of any member of his family; his family physician had several times examined and passed him for life insurance; had examined his urine three months before the accident and found it normal, with no evidence of diseased kidney. All the testimony was to the effect that the accident of falling against the table caused the rupture, the rupture caused the hemorrhage and the hemorrhage caused the death. The majority of the expert witnesses were of the opinion that the cancerous condition of the kidney existed at the time of the accident, and that that condition was the predisposing cause of the rupture; that is, that that condition rendered rupture more liable to occur under the force of the blow than if the kidney had been sound. But some of the expert testimony was to the effect that the cancerous condition itself might have been produced by the blow.

Dr. Hall, a scientific witness for defendant, who examined the kidney after it had been taken from the body, after death, was of the opinion that the cancer existed before the accident, and that the rupture occurred only in the diseased part of the kidney. He said: "The exciting cause of the hemorrhage was the injury and the predisposing cause was the cancer. Q. What

do you mean by the predisposing cause? A. That was the condition of the kidney which gave rise to the production of the fracture. The predisposing cause is the remote cause. . . . The cancerous condition weakened the kidney to such an extent that it responded to this injury by some accidental means." He was asked as to the length of time required to develop a cancer. He answered: "That is a matter which must be stated relatively. I think this is, relatively, a rapid growing cancer. Some cancers are ²⁶¹ matters of years, most of them; but some are matters of months, and others matters of days."

The cause was submitted to the jury under the following instructions asked by the plaintiff:

"1. The court instructs the jury that if they find from the evidence that W. J. Fetter died in Kansas City, Missouri, September 2, 1899, and that such death resulted from bodily injuries sustained through external, violent and accidental means; and that the cause of said Fetter's death was the accidental rupture of his right kidney by an accidental strain, jar or fall while endeavoring to raise a window in his office in the American Bank Building in Kansas City, on the sixth day of August, 1899, their verdict will be for the plaintiffs on both counts of the petition.

"2. The jury is instructed that if they believe from the evidence that the death of William J. Fetter was directly caused by the accidental rupture of his right kidney, then their verdict should be for plaintiffs on both counts of their petition, on the first count in the sum of five thousand dollars and on the second count in the sum of six thousand dollars, with interest on both said sums at six per cent per annum from February 21, 1900, notwithstanding that the jury further believes from the evidence that said kidney at the time of the rupture was diseased, provided, that the jury further find that said Fetter would not have died at the time, under the circumstances and in the manner he did die had it not been for the accidental rupture of his kidney.

"3. The court instructs the jury that the defendant in this case having pleaded an exception in the terms of the insurance policies sued on and having alleged in their answer that the death of W. J. Fetter was caused by disease and not by accident, the burden of proving that said Fetter's death was caused by disease is upon the defendant, and unless they believe from the preponderance of the evidence that said ²⁶² death was caused by disease, they will find for the plaintiffs.

"4. The jury are instructed that they are the judges of the question of fact as to what was the cause of Mr. Fetter's death. If they find from the evidence that the cause of said death was accidental rupture of the right kidney, on or about August 6, 1899, under the circumstances as detailed in evidence, they will find for the plaintiffs, even though they believe from the evidence that said right kidney when so ruptured was diseased."

The defendant asked the following, all of which were refused except No. 2, which the court gave after modifying it by writing the word "direct" before the word "cause":

"1. The court instructs the jury that under the pleadings and the evidence in this cause, you will return a verdict for the defendant.

"2. The court instructs the jury that before they can find the issues for the plaintiffs they must find that the alleged accident was the sole and only cause of the death of the insured.

"3. Upon the question of whether the act of the deceased was an accident or not, you are instructed that if he was suffering or affected at that time with a disease of the kidneys, and the raising of the window would not have injuriously affected him in ordinary health and condition, but would be dangerous to him and result in injury because of the diseased condition of the kidney, then the injury was not due to accidental means independent of all other causes.

"4. The court instructs the jury that if you find the deceased, W. J. Fetter, sustained an accident, but that at the time it occurred he was suffering from a pre-existing disease of the kidney, and if the accident could not have caused death if he had not been affected with disease of the kidney, but that he died because the accident aggravated the effect of the disease or the ²⁶² disease aggravated the effect of the accident, the death of deceased in such case would not be the result of the accident alone, but would be caused partly by the accident, and in such case the plaintiffs cannot recover upon the accident policies sued on in this case.

"5. The court instructs the jury that if you find from the evidence that the kidney of the insured was diseased, or affected by some disease or otherwise impaired, at the time he attempted to raise the window, and that the blood vessel in the kidney was ruptured while he was attempting to raise it, but further find that the rupture would not have been occasioned by the raising of the window if this kidney had not been diseased or impaired, then you are instructed that the insured did

not die of an injury from the accidental means independent of all other causes, and if you so find, your verdict must be for the defendant.

"6. The court instructs the jury that the plaintiffs cannot recover unless the jury find from the evidence that the insured died from external, violent and accidental means independent of all other causes, and that there is no evidence showing or tending to show that any accidental means resulting in an injury was either violent or external.

"7. The court instructs the jury that the insurance policies in question do not undertake to bind the defendant to pay the policies because of or on account of death resulting from an accident, but are limited to and bind the defendant to pay only in case death results from accidental means independent of all other causes. If you find from the evidence that the means employed by the deceased to raise the window were such means as he intended, and that he did not push or shove upon the pole with greater force or strength than he intended, then the plaintiffs cannot recover even though the result of the means employed may have produced the injury.

²⁸⁴ "8. The court instructs the jury that the policies in question do not make the defendant liable by reason of an accident alone, but only make them liable by reason of an injury received from accidental means independent of all other causes. If you believe from the evidence that the means employed by W. J. Fetter to raise the window and his act in raising it was just what he intended to do, that he did it in the manner that he intended, and voluntarily did it, then you are instructed that the means employed by W. J. Fetter was not accidental, although you may further find that the result of the means employed was not contemplated or intended by him.

"9. The court instructs the jury that this action is founded upon accident insurance policies, and that the death of the party insured does not make the company liable because of his death, but that the insurance policies are directly and only applicable to death resulting from an accident independent of all other causes. And in order for the plaintiffs to recover in this case upon the policies, they must establish and show by a preponderance of the evidence that the insured's death was directly caused by some accidental means independent of all other causes. In passing upon this question you will bear in mind and be guided by the fact that if any other cause contributed to the death of deceased than the alleged accident which he received, then

plaintiffs cannot recover. In this connection you are instructed that the testimony in the case shows that at the time of the death of the insured he was affected with a diseased condition of the kidney. Therefore, if you find that such diseased condition of the kidney existed at the time the assured attempted to raise the window, and the raising of the window caused the rupture of the kidney because and on account of the already diseased condition of the kidney and that such diseased condition of the kidney was of such character as that the pushing upon ²⁸⁵ the window might necessarily cause the rupture of the kidney because of its diseased condition, and that the pushing upon the window would not of itself have produced the rupture, but for and on account of the diseased condition of the kidney, then the plaintiffs cannot recover in this action."

Exceptions were duly saved. The verdict and judgment were for the plaintiff on both counts, and defendant appealed.

1. If, after weighing all the evidence in the case, the jury had reached the conclusion that the cancerous condition of the kidney was the result of the blow caused by the falling of the insured, striking his side heavily against the edge of the table, and had based their verdict on that conclusion, it would have had substantial evidence to sustain it.

There were seven surgeons who testified in the case, who were all men of intelligence, learning and high character. They gave their testimony in a manner to show that they were expressing only their honest opinions. They agreed on some but disagreed on other points. The majority of them were of the opinion that the cancer was there before the accident occurred, but that it might not have been. Dr. Hall, a witness for defendant, expressed a more positive opinion than any other surgeon that the cancer existed before the accident. He said: "There is no question in my opinion that it did exist at that time." Yet he also said: "I think this is relatively a rapid growing cancer. Some cancers are matters of years, most of them, some are matters of months and others are matters of days." One of the learned witnesses, Dr. Horigan, said that a blow of the kind in question is a common cause of cancer. Add to this the fact that Mr. Fetter was an apparently healthy, active, energetic business man, who had never had a serious spell of sickness within the memory of any member of his family, that a few days after the accident he was examined ²⁸⁶ by a number of surgeons who made an incision into his back to explore the kidneys and who, with all the aid that

science could afford, discovered nothing wrong except the rupture of the right kidney, and an enlargement of it. Under those facts and in the light of the scientific evidence, who can say, with certainty, that the blow which ruptured the kidney did not also cause the cancerous growth?

The genius of our law does not claim for it infallibility; it recognizes that there is an element of uncertainty that enters into every forensic contest, which human wisdom cannot always make certain, and its aim is to come as close to the right as the means at hand will permit. Under our system of jurisprudence the jury is the tribunal to which questions of this kind are submitted for determination, and with all their human liability to err we have never yet discovered any better tribunal for the trial of questions of fact even where highly scientific propositions are involved. Science itself appeals to common sense for its recognition. On the question of whether or not the blow caused the cancer, if the jury had found either way, the verdict would have had honest, intelligent scientific testimony to support it.

2. There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental, that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. They also concur in the opinion that, conceding the previous existence of the cancer, the man would not have died as and when he did if the accident had not occurred; that whilst death from the cancer might have resulted, it would probably have been deferred several years. But the contention of the defendant is that the accident would not have resulted in the rupture if the cancer had not been there; as defendant's witness Dr. Hall said: "The exciting cause of the ²⁶⁷ hemorrhage was the injury and the predisposing cause was the cancer." On this testimony the defendant says that the death was not the result of the accident "independent of all other causes." If we should give to those qualifying words of the policy the meaning that is now claimed by defendant they were intended to have, there would be scarcely any limit to their nullifying influence. Dr. Hall said in explanation of what has just been quoted, of his testimony: "The predisposing cause is the remote cause." If, therefore, there could be discovered in a man's body after his death any condition, before undiscovered and unsuspected, that under scientific tests would render him more amenable to accidents or less capable of resist-

ing their influence, the policy would not cover the case. The fact that a man is sixty-nine years old, yet with an activity of body ordinarily found only in one much younger, might have something to do both with the fact of an accident and its result, and thus his age and unusual activity could be said to be a predisposing cause—remote, perhaps, as the learned witness designated the cancer in this case—still, in such case, in that sense, the accident could not be said to have been the cause of the death “independent of all other causes.” The causes referred to in the policy are the proximate or direct, not the remote causes. This was evidently the view of the trial court when it modified the second instruction asked by defendant, inserting the word “direct” before the word “cause,” thereby directing the jury that they could not find for the plaintiff unless they found that “the accident was the sole and only direct cause of the death of the insured,” and that view of the law was correct: *Freeman v. Mercantile Mut. Acc. Assn.*, 156 Mass. 351, 30 N. E. 1013. In that case the court said:

“Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in ²⁶⁸ dealing with such cases, the maxim, ‘Causa proxima non remota spectatur,’ is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes.”

The undisputed evidence and conceded facts make out a prima facie case for the plaintiffs, and the defense that there was a remote predisposing cause of the death was given as full and

fair consideration as the defendant was entitled to, and there is not sufficient in the evidence bearing on it to justify any impeachment of the verdict.

3. The theory of the instructions given at the request of the plaintiffs is that if the death of the insured resulted from the accidental rupture of his kidney, the plaintiffs were entitled to recover. These were supplemented by the modified instruction for defendant that the plaintiffs could not recover unless the "accident was the sole and only direct cause of death." Those instructions taken together put the case on the correct theory, and they include whatever there legitimately ^{was} was in the defendant's theory of any other cause. There was really so little in the remote predisposing cause theory that the court would have been justified in ignoring it altogether. It is complained that the third instruction for the plaintiffs was erroneous in placing the burden on the defendant to show that the insured died of cancer. When the plaintiffs introduced evidence tending to show that the insured died of hemorrhage resulting from the accidental fall, they made out a prima facie case: *Laessig v. Travelers' Protective Assn.*, 169 Mo. 272, 69 S. W. 469. It was not necessary, then, for them to take up the defendant's side of the case and prove that the death did not result from any of the excepted causes named in the policies. The defendant in its answer had averred that the man died of cancer; the burden was on the defendant to prove it. From what has already been said it is unnecessary to say that the court did not err in refusing the defendant's first instruction, which was in the nature of a demurrer to the evidence. Defendant's sixth instruction is also in effect a peremptory direction to find for defendant.

Instructions 3, 5, 7, 8, and 10 refer the cause of the rupture to the strain in raising the window and leave out of view entirely the accident of the pole slipping off the rim of the window sash and causing the insured to fall against the edge of the table.

Defendant's instruction 4 directs the jury that the plaintiffs cannot recover "if the accident could not have caused death if he had not been affected with disease." There was no evidence to sustain any such hypothesis.

We find no error in the record. The judgment is affirmed.

All concur.

If an Accident Insurance policy insures against death from bodily injury caused through external, violent, and accidental means, but

excepts from liability for death from hernia or medical and surgical treatment, the insurer is liable when the proximate cause of death is hernia inflicted by external, violent, and accidental means: *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774. See, too, *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, and cases cited in the cross-reference note thereto.

CHANDLER v. KANSAS CITY MISSOURI GAS CO.

[174 Mo. 321, 73 S. W. 502.]

MASTER AND SERVANT—Dangerous Premises—Hole Dug by Licensee.—If a gas company permits third persons to take cinders from the end of a dump which has been built up by cinders carried in cars along a track from the works, and one of these persons, just before dark and without being seen, instead of filling his wagon from the end, takes a load at a point farther back on the dump, making a hole under the track, the company is not liable to one of its employes who, in running a cinder-car, about an hour later, falls into the excavation. (p. 575.)

Gage, Ladd & Small, for the appellant.

Scarritt, Griffith & Jones, for the respondent.

324 VALLIANT, J. Action for damages for personal injuries sustained by plaintiff while in the service of defendant and which plaintiff alleges were the result of defendant's negligence.

Defendant is a manufacturer of illuminating gas, having several factories in Kansas City near the intersection of Front and Harrison streets, one of which is on the south side of Front street and another one on the north side. There is an ashpit in the basement of the latter, into which cinders and ashes are deposited and thence removed in a car up an incline to a point about thirty-five feet east of the factory, from which point the car is pushed by hand down an incline to a track along a level, on which it is further pushed by hand eastward eighty or a hundred feet, where the ashes and cinders are dumped, and the car is then returned to the ashpit for another load. The business was so extensive that the ashpit had to be cleaned out three times a day, and five carloads containing a cubic yard each were taken out at each cleaning. The cinders were being used by the defendant to raise the surface of the ground in front of the factory. The track along which the car was pushed was made of iron rails laid on longitudinal sills elevated four to six feet above the natural surface of the ground, but at the

time of this accident the process of filling had progressed so far that the space under the track and on both sides to a considerable distance north and south had been filled with cinders and leveled. The process of filling was being extended eastward and when the ground at the end of the track was filled and leveled north and south as far as desired, the track would be extended farther east to continue the process. The plan of the defendant was to use the cinders from this factory for this filling purpose. But the factory south of Front ³²⁵ street produced cinders in considerable quantity, also, which were not so convenient to dispose of, and those cinders the defendant sold to concerns in the vicinity who hauled them away in wagons and used them for filling up low grounds of their own. It sometimes occurred that there was not enough cinder output from this south factory to meet the demand, and when that was the case the defendant allowed the wagons to take cinders from the north side. To do this the usual course was for the wagons to go to the east end of the track above described and take the cinders from the dump.

Among the concerns hauling cinders from these gas works was a lumber company whose driver was named Knight. He had been hauling there a considerable time, usually getting his loads from the south factory, but also when there were no cinders there, getting them from this dump. He was so engaged on December 27, 1899; he had hauled one load from the dump in the afternoon of that day, and returned about 5 o'clock for another. He loaded his wagon at the dump, but he experienced some difficulty in hauling it from that point, and thereupon he threw out the load he had taken, and drove his empty wagon west along the north side of the track about sixty feet from the dump, and there stopped and filled his wagon with cinders which he dug out from the side and under the track, making a hole or pit under the track about four feet deep and six feet long. It was about half-past 5 o'clock when he did this and it was just about dark. No one saw him do it. He drove away in the dark, leaving the hole as he had dug it.

Plaintiff was in the service of the defendant as a common laborer. Cleaning out the ashpit and pushing and dumping that cinder-car were not his regular duties, but he was frequently called on to do it and was familiar with the work. He had made several trips with the car on the day in question, when he was ordered ³²⁶ to another part of the works on some duty and was to return to the cinder-pit at 6 o'clock to clean it

out. He did so, and passing along the south side, pushed a car of cinders out to the end of the track and dumped it, then returning, walking in the track, pushing the car, he fell into the hole which Knight, the driver of the lumber company, had recently made as above mentioned, and received severe injuries.

Knight, as a witness for plaintiff, testified that the orders from the defendant's man to him were to haul cinders from the south side, but when there were no cinders there, for accommodation, he could go on the north side and get them, and he did so, and as did also other haulers, all of whom usually went to the end of the dump for their loads. The witness, in undertaking to tell what orders he had from the defendant's superintendent as to where he could take cinders from, used this expression, "We could get them where we pleased, and all we had to do was to come to the office and pay for them." But on the further examination he said that no one pointed out to him where he was to get the cinders except that he was told he could go over to the north side and get them.

"Q. But you went over there and took them from the end of the dump for several days. A. Yes, sir.

"Q. And you saw others taking them from the end of the dump? A. Yes, sir.

"Q. That was the place where it would do no injury to the track, was it not? A. Yes, sir.

"Q. On this occasion you had a team of young mules that did not work very well, or at least got stuck with a load in the hole at the end of the dump, and you then unloaded and drove up and made this excavation under the track? A. Yes, sir.

"Q. Without any authorization from anybody connected with the gas company? A. Yes, sir."

And on further examination by plaintiff's attorney:

327 "Q. And he told you that when the cinders gave out at the south dump to go over to the north dump where the cinder track was and get them wherever you pleased? A. No, sir, he did not.

"Q. You disobeyed his instructions? A. He did not tell me I could get them wherever I pleased; he told me I could go around there and get my load."

The evidence showed that the ground along this track which had been raised by the deposit of cinders was leveled off and used for storing gaspipe by defendant.

The evidence for the defendant was to the effect that the men hauling cinders were directed to get them from the south side, but when there were no cinders there they were told that they might go to the end of the dump on the north side and get them, and the defendant never knew that any cinders were taken from the north side except from the end of the dump. Defendant knew nothing of this hole that Knight dug in the track until after the accident, which happened about an hour after the hole was dug. It was after dark, and no one in the employ of defendant had occasion to go out there, except the man who pushed the cinder-car.

At the close of the plaintiff's evidence the defendant requested an instruction to the effect that the plaintiff was not entitled to recover, which the court refused and defendant excepted.

The case was given to the jury under an instruction that declared the defendant liable if the defendant authorized Knight and others to take cinders from the vicinity of the cinder track, and in doing so "the defendant knew or as a reasonably careful and prudent person might have known that in doing so said persons would be liable to excavate cinders near or under said cinder track," etc.

And at the request of the defendant the court instructed the jury that there was no evidence that defendant or any of its agents "knew or by the exercise ²²⁸ of ordinary care might have discovered before the plaintiff was injured" that the excavation had been made. There was a verdict and judgment for plaintiff for seven thousand five hundred dollars, from which defendant appeals.

The court should have given the instruction asked by the defendant in the nature of a demurrer to the evidence. There was no evidence tending to show any negligence on the part of defendant. The court correctly instructed the jury that there was no evidence that defendant knew or could have known by the exercise of ordinary care that the hole had been dug in the track before the accident occurred, yet an instruction given at the request of plaintiff authorized the jury to convict the defendant of negligence if a reasonably careful and prudent person might have known that the persons hauling the cinders were liable to dig them out from under the track.

On that theory the defendant, under the circumstances in the case, would not be a reasonably careful and prudent person if, in granting permission to the men to haul cinders from the end of the dump, it trusted that they, in availing themselves of

the permission, would act as reasonable men usually act under like conditions, or that they would at least refrain from acts of willful wrongdoing. Such a rule of law would impose on one in defendant's position the duty of exercising the utmost care which distrust could suggest and unceasing vigilance. Ordinary business could not advance under such a rule.

The learned counsel for respondent in their brief say: "It is a far call from the certainty that a thing is to happen, to the bare possibility that the thing is to happen." All the shades of difference between the certainty and the bare possibility there referred to are covered when we say that the thing is liable to happen. It may be probable or improbable, a reasonable or an unreasonable expectation, yet if it may possibly occur ³²⁹ it is liable to occur. These men, permitted to enter defendant's premises and load their wagons with cinders, were liable to do just what this man did, more liable, perhaps, to do so when as in this case darkness assisted him, but the fact is that although a number of men from different concerns, this man among them, had been hauling cinders from there for a considerable time, no one had ever done such a thing before, and there is nothing to suggest that such a thing was at all likely to occur. The utmost caution that distrust of mankind could suggest might possibly have anticipated it and unceasing vigilance have prevented it, but the law required of defendant no such degree of caution and no such vigilance. Reasonable care is all that the law demands. In *Fuchs v. St. Louis*, 167 Mo. 620, 646, 57 S. W. 610, this court, per Tittmann, J., quotes with approval Ray on Negligence, pages 133, 134: "A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chance, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things."

Reference is also made in that opinion to Webb's *Pollock on Torts*, enlarged American edition, pages 45, 46, from which is quoted: "This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in defendant's place should have foreseen as likely to happen,

there is no wrong and no liability": See, also, *Beasley v. Linehan Transfer Co.*, 148 Mo. 413, 50 S. W. 87; *Stone v. Boston etc. R. R. Co.*, 171 Mass. 536, 51 N. E. 1. Applying the law as above quoted (with the statement of which we are entirely satisfied) to the ³³⁰ facts of this case, even as made out by the plaintiff's evidence alone there is nothing to show a neglect of duty on the part of the defendant and nothing to render it liable. True, the witness Knight said he could get cinders from where he chose, but when questioned on that point he said that no one had told him he could do so, and he knew that the place they were expected to get their loads from was at the end of the dump. He also said that he had before taken cinders from the side of the track, but he was very indefinite on that point, and if he did so there is nothing to show that defendant knew it. The formation of the raised surface of the ground and its obvious use showed to any reasonable man that defendant would not knowingly allow a pit to be dug under the track as was done. The evidence of defendant was explicit that the men were ordered to get the cinders from the end of the dump, and that so far as defendant knew or could reasonably have known that was done. The evidence of plaintiff, though not so explicit, is yet practically to the same effect.

The instruction asked by the defendant in the nature of a demurrer to the evidence should have been given.

The judgment is reversed.

All concur.

It is the Duty of a Master to use reasonable diligence in seeing that the place where his servant is at work is safe for that purpose, and the latter has a right to assume that such duty is discharged: Morris & Co. v. Malone, 200 Ill. 132, 93 Am. St. Rep. 180, 65 N. E. 704; *Thompson v. Bartlett, Hayward & Co.*, 71 N. H. 174, 51 Atl. 633, 93 Am. St. Rep. 504, and cases cited in the cross-reference note thereto. The measure of his duty in this respect is the diligence exercised by reasonably prudent men and required by the ordinary usage of the business: *Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 519, and cases cited in the cross-reference note thereto.

PETER v. BYRNE.

[175 Mo. 233, 75 S. W. 433.]

HUSBAND AND WIFE—Conveyance of Wife's Property—Joinder of Husband.—The deed of a married woman conveying her separate property, containing the name of herself only as grantor, but reciting that she is "Sarah Peter, wife of Armenius Peter," while her husband joins her in signing and acknowledging such deed, and the granting clause, covenant of warranty, and testimonium clause thereof use the term in the plural "parties of the first part," is sufficient as his assent and joining with her under the statute, to convey her estate, especially when they surrender possession to their grantee who holds and enjoys it so long as the grantors live. (p. 578.)

HUSBAND AND WIFE—Conveyance of Wife's Property—When Binding on Him.—If a husband joins with his wife in signing and acknowledging a deed purporting to convey her lands, he is bound by the premises therein contained, though his name may appear nowhere else in the deed. (p. 580.)

Vories & Vories and S. P. Reynolds, for the appellants.

Haynes & Corbey and B. R. Vineyard, for the respondents.

²³⁹ FOX, J. It will be observed that this is a suit in ejectment for the possession of the north fifty-six feet of lots 6 and 7 in block 30, St. Joseph improvement addition to St. Joseph, Missouri. At the trial it was admitted that Sarah M. Peter was the common source of title. Also that Sarah M. Peter, the mother of plaintiffs, was married to Armenius Peter at the time she acquired this property by a general warranty deed, and continued to be his wife until her death. The evidence showed that Sarah M. Peter departed this life on the twenty-ninth day of November, 1889. That plaintiffs Robert N. Peter and Turah Duncan, were her only children and heirs at law. That said Armenius Peter departed this life on the twenty-seventh day of July, 1899. It was contended by the plaintiffs at the trial that the Peters deed was void and ²⁴⁰ of no effect because it purported to be a deed of a married woman conveying her real estate without her husband joining her as a grantor in the deed, the name of her husband, Armenius Peter, not appearing in said deed as a grantor. The defendants also introduced a deed in evidence from Annie Oatman and her husband, purporting to convey this property to defendants. The evidence also showed that defendants had had possession of this property for sixteen years. There is only one question for decision in this cause, viz.: Is this instrument of writing purporting to be

the deed of Sarah M. Peter to Annie Oatman void? If said deed is void, then plaintiffs are entitled to recover; if the deed is valid, they are not.

At the close of the evidence in this cause, plaintiffs requested the court to declare the law as follows: "The court declares the law to be that the deed introduced in evidence by defendants from Sarah M. Peter to Annie Oatman, recorded in book 130, at page 244, is void and of no legal effect, and the finding and judgment must be for the plaintiffs." The court refused this declaration of law and plaintiffs duly preserved their exceptions to the action of the court.

This instruction very sharply presents the only question involved in this suit. It will be noted that the deed before us for construction recites that "Sarah M. Peter, wife of Armenius Peter, of the first part." Then follows the granting clause: "Witnesseth, that the said parties of the first part, in consideration," etc., "have given, granted, bargained and sold," etc. The concluding clause of this deed recites that, "In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first herein written." In addition to this, the covenants of warranty in this deed use this language: "The said parties of the first part do covenant," etc.

²⁴¹ Appellants earnestly insist that this deed was inoperative and did not convey the title vested in Sarah M. Peter, for the reason that she was a married woman and that the deed upon its face does not show that her husband joined with her as grantor in said deed.

Sarah M. Peter was the owner of the legal title to the land in controversy in this suit. In 1883, at the time of the execution of this deed by her, she was the wife of Armenius Peter. This leads to the inquiry as to the provisions of the statute then in force, in respect to a conveyance of the real estate of the wife, during coverture.

Section 669 of the Revised Statutes of 1879, the law in force at the time of the execution of this deed, provides: "A husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed, acknowledged and certified as herein provided; but no covenant, expressed or implied, in such deed, shall bind the wife or the heirs, except so far as may be necessary effectually to convey, from her and her heirs, all her right, title and interest expressed to be conveyed therein."

The provisions of this statute are plain and unambiguous. The proposition must be conceded that to convey the real estate of the wife, it must be accomplished by the joint deed of the husband and wife. This has been so ruled in numerous cases, and decided by this court: *Huff v. Price*, 50 Mo. 228; *City of Marshall v. Anderson*, 78 Mo. 87; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13.

It will be observed that the defect in the deed before us for construction, if it can be called a defect, appears in the introductory clause. The husband signed and acknowledged this deed; the granting clause, the covenant of warranty and the testimonium clause of the deed use terms in the plural, "parties of the first part."

²⁴² We have now confronting us the one vital proposition, Did the acts of the husband in respect to this deed constitute such a joining in the deed as to make the conveyance operative?

It must be remembered that, from the earliest history of the marriage relation, the husband and wife have been regarded as one. The wife at all times has labored under very strong disabilities in respect to her property rights; as civilization advanced, wisdom has kept pace with it, hence we have some of the ancient shackles removed from married women, whose very life and existence was heretofore merged into that of the husband.

At the time of the execution of this deed, the statute quoted was in force, and it is not deemed an unwise provision, for it had in view many noble purposes other than the mere imposition of a disability. One of the objects was to harmonize the interests of husband and wife, that they both might jointly enjoy the property owned by one or the other. Another was that this enjoyment of interest might not be severed without the knowledge and acquiescence of both. Another was the protection thrown around the wife in respect to her property, that in the alienation of it, she should consult the husband, and have, at least, his concurrence in the sale, by joining her in the conveyance of it. Another was the protection of the marital interest of the husband in the property of the wife.

We have carefully examined the deed involved in this suit, and have reached the conclusion that it substantially complies with the spirit of the statute, which requires the husband to join in the deed, in order to convey the real estate of the wife. They both signed and acknowledged this deed, surrendered possession to their grantees, who held and enjoyed the undisturbed

possession as long as the grantors lived. Their acts in this respect add additional force to the words of the deed. Their acts gave a practical construction to this ²⁴³ deed that it was a joint instrument, and recognized that it conveyed the estate intended to be conveyed. We take it that the construction given this deed by the parties joining in it is not only supported by sound reason, but by the weight of authority wherever this precise question has been before the courts.

It must be noted that this statute is dealing with the real estate of the wife, simply making a provision as to how it may be conveyed. It is true that the husband has a marital interest, which, when he joins in the deed, it is supposed to convey; but it must be remembered that the husband is not laboring under any disabilities, and as to his acts in the execution of a deed, they will be construed most strongly against him. In his acknowledgment of this deed, he says it is his "free act and deed." He was presumed to know the contents of it, and was presumed to know the purposes for which it was executed.

We start out in the discussion of this proposition, supported by the elementary principle that "every deed must, if possible, be made operative."

In the case of *Elliott v. Sleeper*, 2 N. H. 525, one of the earliest cases on this subject, the doctrine is very clearly announced. It was said by the court in that case: "And for the purpose of our present inquiry, it may be admitted that the usage, however diversified in its forms, always requires the husband and wife so far to join as to convey at the same time, on the same paper, and both in language suitable to pass the title of real estate. Whether this requisition has here been fulfilled is a question of some difficulty, on both authority and principle. It cannot be doubted, that the signature, sealing, and acknowledgment of this deed by the husband, being on the same paper with those of the wife, and in the usual form, are in themselves sufficient. But it is objected that he is not named in the deed as a grantor, and that without being so named, the deed is ²⁴⁴ not his deed, and in respect to him is altogether inoperative. But it seems well settled that whoever signs and delivers an unsealed writing is bound by the promises contained in it, though his name may not appear on the paper, except in his signature: *Little v. Weston*, 1 Mass. 156; *Fisher v. Leslie*, 1 Es. Cas. 426. This seems founded on the obvious and reasonable principle, that such acts amount to an adoption of all which precedes the signature, and that no other legitimate

cause for these acts can be assigned than a design to make all the promises to which the signature is affixed, the promises of the subscriber. . . . In sealed instruments, such as bonds and wills, the same principle applies and appears to be supported by numerous authorities."

To the same effect is *Woodward v. Seaver*, 38 N. H. 29. It will be noted that the case of *Elliott v. Sleeper*, 2 N. H. 525, is there reaffirmed. The court said: "In this case, Hannah I. Woodward owned the land, and in order to convey her right it was necessary that her husband should join with her in the conveyance; her separate deed would be void, and convey no title. The husband's name does not appear in the body of the deed, but there is a clause purporting to release Hannah I. Woodward's right of dower, and all her other rights in the premises, in which she is described as wife of the grantor. It therefore appears on the face of the deed that she was a married woman, and consequently that to give her conveyance effect it was necessary her husband should join in the deed. Her husband signed and sealed the deed. This would seem to bring the present case very distinctly within the authority of *Elliott v. Sleeper*, 2 N. H. 525. In that case, as in this, the land belonged to the wife; the deed purported to be her sole conveyance, but was signed and sealed by her and her husband, and she is described as being the wife of Nathaniel Brown, who signed and sealed the deed. From this the court say it appears that it was necessary he should join with her in the conveyance. So it appears ²⁴⁵ from the deed in the present case that Hannah I. Woodward was a married woman, and that to make her deed operative it was necessary her husband should join in the conveyance."

In Connecticut, the supreme court made application of a statute very similar to ours upon this subject. In discussing this question, it said: "The petitioner insists that the absence of the names of the two husbands from the body of the deed invalidates the conveyance so far as the interests of their respective wives is concerned; and asks for the removal of the cloud thereby placed upon his title. But this claim is without foundation. Except in cases where there is statutory requirement of some other or further formality, the act of signing a written contract is, as a matter of law, the adoption of all that is contained therein—the assumption of all the obligations which its language expresses. No other intent can be legitimately imputed to the signer, and whenever it is permissible the law will give effect to such intent. Our statute provides

that 'all conveyances of the real estate of married women executed by them jointly with their husbands, and duly acknowledged and recorded, shall be valid and effectual to transfer such estate.' The land was the property of the wife; power to convey is given to her, to be effectually exercised, it is true, only when the husband joins in the execution—when he signs her deed of conveyance and duly acknowledges the act. By signing, he gives proof that he has had an opportunity to protect her from an improvident contract, and that he surrenders to her grantee all the right, title and interest, which he as husband has in the land": *Pease v. Bridge*, 49 Conn. 58.

The statute referred to in this case is substantially ours; its terms vary somewhat; it provides that "all conveyances of the real estate of married women executed by them jointly with their husbands, and duly acknowledged ²⁴⁶ and recorded, shall transfer the estate." Our statute uses the term, "by their joint deed acknowledged and certified as herein provided." Both statutes require a conveyance, and it must be executed and acknowledged. This case, construing the effect of a conveyance similar to the one before us, with a statute so nearly like ours, is very strong support to the conclusion we have reached in this cause.

In the case of *Schley v. Pullman Car Co.*, 25 Fed. 890, the language is so appropriate to the facts in this case that we quote it. The court said: "It is insisted by counsel for the plaintiff that the statute required the husband to be a joint grantor with his wife; that his mere signing, sealing, and acknowledging the deed was not sufficient when his name did not appear in the granting clause or body of the instrument; and that it was therefore inoperative and void. It was only in substantial compliance with this statute that the wife could convey the title to her lands. The husband was required to join her in the execution of a deed. Did the husband so join in the execution of this deed? That he intended to do so, and thought he had, admits of no doubt; and it is equally clear that both the wife and husband undertook in good faith to convey their entire interest and estate in the premises to the grantees. The husband signed, sealed, and acknowledged the deed, to enable his wife to convey her title, and to convey any claim or right, present or contingent, that he had in the land. The wife and her husband rested and no doubt died in the belief that they had joined in the execution of a deed in compliance with the statute; and it remained for some one, after the

lapse of twenty-nine years, to discover, as he supposed, that they had utterly failed to accomplish what they undertook to do, and what they supposed they had done. Courts should uphold deeds and other contracts when the intention of the parties is clear. Although the husband's name does not appear in the body of the deed, ²⁴⁷ he signed, sealed and delivered it, and thus joined his wife in its execution."

The views of courts in modern times upon the construction of instruments conveying real estate, are very appropriately expressed in the case of *Roberts v. McIntire*, 84 Me. 362, 24 Atl. 867. In discussing this subject, it said: "There are certain elementary principles applicable to the construction of written contracts which are matters of such common knowledge and universal acceptance as to render the citation of authorities a profitless task. There are pregnant legal maxims which are the deductions of reason and the conclusions of common sense approved by the wisdom of ages. But their practical application must, in some instances, be qualified or restricted by technical rules which ascribe definite meanings to particular expressions, in order to secure uniformity and to enable parties to understand the effect of the language employed in contracts made or accepted by them. All agree, however, that it is the constant desire of the law to uphold a contract rather than destroy it, to effectuate the intention of the parties and not to defeat it. . . . But, with respect to conveyances of real estate, courts in modern times have shown more consideration for the substance of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and whenever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect."

The supreme court of Florida in the case of *Evans v. Summerlin*, 19 Fla. 858, construing a deed like the one before us, and under a statute nearly identical to ours, held that the signing and acknowledging of the deed by the husband, was, in contemplation of the statute, a joining with his wife in such conveyance. To the ²⁴⁸ same effect in the case of *Stone v. Montgomery*, 35 Miss. 107. The court very clearly interprets the deed in that case. It said: "The last objection urged against the deed is, that the husband is not a party grantor, and named as such in the body of it; and, therefore, that it is not the joint deed of husband and wife, and is insufficient, under our statute,

to convey her separate property. It would be a sufficient answer to this objection that it was not set up either in the original nor amended bill. On the contrary, the deed is treated in the pleadings as the joint deed of the husband and wife. But, if the objection had been made in the pleadings, it would be untenable. The property is admitted to belong to the wife, to her sole and separate use; and, of course, the husband had merely a secondary interest in it; it was her act which was essential to the conveyance. But he signed the deed and acknowledged it as his act and deed, for the purpose stated in it. That was sufficient to show his consent and co-operation in the conveyance in the most certain form; and the reason of the statute, in requiring the conveyance to be made by the joint deed of the husband and wife, is that it may be made with his aid and consent. His signing, delivery, and acknowledgment of the deed, would estop him from setting up any claim to the property against the grantee, and show that the title of the wife was conveyed by his co-operation. Under such circumstances, the deed is sufficient under the statute to convey the wife's estate."

Numerous other cases maintain the same position, with few exceptions. The expression of all the courts upon the question directly involved in the construction of this deed, are harmonious: *Ingoldsby v. Juan*, 12 Cal. 564; *Dentzel v. Waldie*, 30 Cal. 138; *Mardes v. Meyers*, 8 Tex. Civ. App. 542, 28 S. W. 693; *Miller v. Shaw*, 103 Ill. 292.

There is a clear distinction between the cases where the husband undertakes to convey the real estate of the wife, and the deed fails to disclose the wife as one ²⁴⁹ of the grantors. As before stated, the wife labors under certain disabilities, and the courts, with the view of protecting her rights, insist that the instrument shall disclose the performance of every act on her part necessary to convey her estate.

In the case of *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166, the principal cases relied upon by appellant in this case are reviewed, and the court announces that they are distinguishable from the cases of the character before us for determination.

This deed should be construed in accord with the clear intention of the parties who executed it. Judge Burgess very appropriately said in case of *Walton v. Drumtra*, 152 Mo. 497, 54 S. W. 233: "The rigid rules of construction applied to deeds and wills in former years have in modern times been somewhat modified, so that deeds are now construed so as to carry into effect the intention of the parties thereto, and wills the in-

tention of the person executing them"; See, also, *Mills v. Catlin*, 22 Vt. 98.

After sixteen years of undisturbed possession of this property, under an instrument executed by the husband and wife, acknowledged by them to be their free act and deed, to hold that, because the husband's name does not explicitly appear in the introductory clause of the deed, it was invalid, because not jointly made, would, in our opinion, be doing violence to the spirit of the statute, as well as an absolute abandonment of substance and a complete surrender to form.

The judgment in this cause should be affirmed, and it is so ordered.

All concur.

WHAT IS SUFFICIENT JOINDER OF HUSBAND IN CONVEYANCE OF WIFE'S REAL ESTATE.

I. Omission to Name Husband as Grantor.

- a. Deed Sufficient if Husband Signs and Acknowledges.
- b. Effect in Some Jurisdictions of Failure to Name Husband as Grantor.
- c. If Ineffective as Deed, may be Effective as Contract to Convey.

II. Joinder of Husband by Separate Instrument.

III. Effect of Failure of Husband to Sign Deed.

I. Omission to Name Husband as Grantor.

a. Deed Sufficient if Husband Signs and Acknowledges.—In many of the states statutes provide in effect that husband and wife may by their joint deed convey her real estate in like manner as she might do by her separate deed if she were unmarried, or that all conveyances of the real estate of married women executed by them jointly with their husbands, and duly acknowledged and recorded, shall be valid and effectual to transfer such estate; or that husband and wife may convey her real estate by their joint deed acknowledged and certified as required by statute. The question very often arises under such statutes as to what is the joint deed of husband and wife, or when is a deed by a married woman jointly executed with her husband. This question is most often presented to the courts when the name of the husband as a grantor is omitted from the body of the deed, although he signs and duly acknowledges it. While there is some diversity of opinion on this question, the prevailing rule as sustained by the great weight of authority is that a deed of a married woman of her separate real estate, signed and acknowledged by her husband, is good and passes the title, although he is not named as grantor or otherwise in the body of the deed. In other words, it is generally maintained that it is not necessary that the husband's

name as grantor, should be inserted in the body of a deed given by a married woman conveying her separate estate, but it is sufficient if he sign, seal, and acknowledge it: *Dentzel v. Waldie*, 30 Cal. 138; *Pease v. Bridge*, 49 Conn. 58; *Evans v. Summerlin*, 19 Fla. 858; *Miller v. Shaw*, 103 Ill. 277; *Dean v. Shreve*, 155 Ill. 650, 40 N. E. 294; *Chapman v. Miller*, 128 Mass. 269; *Merrill v. Nelson*, 18 Minn. 374; *Stone v. Montgomery*, 35 Miss. 83; *Elliott v. Sleeper*, 2 N. H. 525; *Woodward v. Seaver*, 38 N. H. 29; *Clark v. Clark*, 16 Or. 224, 18 Pac. 1; *Thompson v. Lovrein*, 82 Pa. St. 432; *Friedenwald v. Mullan*, 10 Heisk. 226; *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 695; *Schley v. Pullman Palace Car Co.*, 25 Fed. 890, affirmed 120 U. S. 575.

The reason for the rule has been variously stated. Thus, in *Thompson v. Lovrein*, 82 Pa. St. 437, the court said: "As the essential thought of a husband's joinder with his wife in her conveyance of her estate, is his consent to her act, we think his sealing and signature to the deed, duly acknowledged as his act and deed, fully supply the evidence of this consent. True it is that the entire language of the deed is that of the wife alone; even to the concluding words, 'in testimony whereof,' yet when the husband signed and sealed it with her, and solemnly declared it to be his deed for the purposes contained in it, he adopted all that was before his signature. The true purpose of the law is therefore answered." In another case it was said, that "the purpose or reason why the law requires that the husband should join in the deed with his wife is, that his assent to the conveyance might appear, and that it might also appear that he was present to protect her from imposition. Why should he, upon the face of the deed, be required to say that he conveys, and is seised and possessed, and has a good right to convey, when these covenants as to land belonging to his wife are not true. All that is required of him is to signify his assent and presence by his signature. That binds him to all the recitals contained in the instrument, and makes it as much his deed or obligation as if his name was inserted in the body of it. By his signing, delivery, and acknowledgment of the deed he would be forever estopped from setting up any claim to the property conveyed": *Friedenwald v. Mullan*, 10 Heisk. 231.

Again, in *Stone v. Montgomery*, 35 Miss. 107, it was said: "The property is admitted to belong to the wife, to her sole and separate use; and of course the husband had merely a secondary interest in it. It was her act which was essential to the conveyance. But he signed the deed and acknowledged it as his act and deed for the purposes stated in it. That was sufficient to show his consent and co-operation in the conveyance in the most certain form; and the reason of the statute, in requiring the conveyance to be made by the joint deed of the husband and wife, is that it may be made with his aid and consent. His signing, delivery, and acknowledgment of the deed would estop him from setting up any claim to the property against the grantee, and show that the title of the wife was con-

veyed by his co-operation. Under such circumstances, the deed is sufficient under the statute to convey the wife's estate."

In *Pease v. Bridge*, 49 Conn. 61, the court expressed itself as follows: "The land was the property of the wife; power to convey is given to her, to be effectively exercised, it is true, only when the husband joins in the execution—when he signs her deed of conveyance and duly acknowledges the act. By signing he gives proof that he has had an opportunity to protect her from an improvident contract, and that he surrenders to her grantee all the right, title, and interest which he, as husband, has in the land. The statute, it will be observed, only requires that he shall execute in legal language, he who signs executes, and we may not add to the statutory requirements another, namely, that his name shall also be inserted in the premises of the deed."

In delivering the opinion in *Dentzel v. Waldie*, 30 Cal. 149, Mr. Justice Sanderson said: "What is here meant by the words 'joint deed'? Is it necessary that the husband should appear as a grantor in the body of the deed, or is it sufficient if he join in signing, sealing, and acknowledging? Why make him play the part of a grantor when he has nothing to grant? His assent to the act of his wife is all that the policy of the law could require. That is as well signified by a joint signing and sealing only, as by making him assume in addition, a false character."

In *Schley v. Pullman Car Co.*, 120 U. S. 575, 7 Sup. Ct. Rep. 730, it was decided that a deed of a married woman conveying her separate estate, signed, sealed, and acknowledged by her husband, was sufficient, although his name did not appear in the granting clause of the instrument, and the court, in disposing of this question, which arose in Illinois, said with reference to the statute and decisions of that state that "if, under a statute making it lawful for husband and wife to execute a conveyance of her real estate, they will both be held to have executed a conveyance of her separate property where her name appears, but that of the husband does not appear, in the granting clause of the deed, but they both sign and acknowledge it in the mode required by law; and if the wife's estate of homestead can be conveyed by a deed signed and duly acknowledged by herself and husband, her name, however, not appearing in the body of the deed, it would seem to follow that, within the meaning of the act of 1847, and according to the tendency of the decisions of the supreme court of the state, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed both by herself and husband, is acknowledged by both and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife, as if his name had also appeared in the granting clause": *Schley v.*

Pullman Car Co., 120 U. S. 583, 7 Sup. Ct. Rep. 730. Many other interesting cases are cited above, but they are quoted from so fully in the principal case that further mention of them here is omitted.

It seems to be an almost universal rule, as announced in the cases already cited, that a deed from a married woman for her separate estate in land, signed and acknowledged by her husband, is good and valid, though he is not named as grantor, or in any way in the body of the deed, but that such deed is not effective unless acknowledged by both husband and wife: *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 695.

It is a sufficient joinder of a husband in his wife's deed of her land derived from him, for him to express his assent by signing and acknowledging the deed under his own hand and seal, without being named in such deed as grantor, or in any way being made a formal party to the deed: *Bray v. Clapp*, 80 Me. 277, 6 Am. St. Rep. 197, 13 Atl. 900; *Roberts v. McIntire*, 84 Me. 362, 24 Atl. 867. In such case, the assent in writing required by statute of a husband to his wife's deed of her real estate, is sufficiently shown by the insertion of his name in the attestation clause, "in token of relinquishment of his right in the above-named premises" with his signature and acknowledgment: *Chapman v. Miller*, 128 Mass. 269. If a wife holds property under a deed of gift from her husband, by which it is conveyed to her and her children jointly, with power to her as guardian or trustee, to "make sale of such and all of said property, whenever she may see proper to do so, and appropriate the same for the general good of the children and herself as a family," a deed executed by her and properly acknowledged by herself and husband, and to which her husband's name is signed, though he is not named in the deed as a party, is sufficient to pass the title to the property: *Holleman v. De Nyse*, 51 Ala. 95.

b. Effect in Some Jurisdictions of Failure to Name Husband as Grantor.—Some of the cases are directly opposed to the generally prevailing rule announced above. This is noticeably so in Alabama. In that state a statute provided that, "conveyances of a wife's property, made in writing by husband and wife jointly and acknowledged before some officer authorized to take acknowledgments of conveyances are valid and adequate to pass the wife's estate," and it was held thereunder that a conveyance, by a married woman of lands belonging to her as her statutory separate estate, signed and acknowledged by herself and husband, but in which he is not named as a grantor, and which contains no words of conveyance passing, or evidencing an intention to pass, his estate or interest in the lands, is merely the void deed of the wife, to which the husband was not a party, and to which his concurrence was not expressed in the mode prescribed by statute. It cannot be enforced in equity as a contract to convey, although the purchase money has been paid and possession taken and continued by the purchaser thereunder for a number of

years. This decision was placed partly on the ground that the husband held an interest as trustee to take the rents and profits of the wife's separate estate and consequently must join the wife in the granting part of her conveyance thereof the same as if he were equally interested therein with her: *Blythe v. Dargin*, 68 Ala. 370-376. Under a later statute in that state, the words of which will be quoted below, the court again held in *Davidson v. Cox*, 112 Ala. 510, 20 South. 500, that it was necessary to a valid conveyance of a wife's lands that her husband should join in the alienation in the same manner as if the land belonged to him in severalty, jointly, or in common with others, and that his mere signature to his wife's deed, purporting to convey her land, her name only appearing in the body of the instrument, is not an efficacious manifestation of the assent and concurrence of the husband in the conveyance as required by the statute, and that such conveyance is but the void deed of the wife, and not effective to pass title. In reaching this conclusion the court said: "The only question in this case is whether the mere signature of the husband to the wife's deed purporting to convey her land, the wife's name only appearing in the body of the instrument, is an efficacious manifestation of his assent to, and concurrence in, the conveyance. In our opinion, the express terms of the statute answer this inquiry in the negative. Its language is: 'The wife cannot alienate her lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land': Code, 1886, sec. 2348. This can mean nothing more nor less than that the husband shall join in the alienation in such way as would be necessary to a conveyance of his interest in the land if the land belonged to him in severalty or jointly or in common with others; and in such case his mere subscription to the conveyance another party alone being mentioned in the instrument as grantor, would not make it his deed, nor pass any interest he owned in the premises: *Sheldon v. Carter*, 90 Ala. 380, 8 South. 63. This view is strengthened by the rulings of this court on the former statute . . . and under which it was held that an instrument such as we have here, purporting to be the conveyance of the wife alone on its face, but signed by both husband and wife, is no more nor less than the void deed of the wife, to which the husband is not a party and to which his concurrence is not expressed in the only mode in which the law authorizes its expression: *Blythe v. Dargin*, 68 Ala. 370. It is urged, however, that the husband had some interest or title in the wife's lands as her trustee under the former statute which he has not under the present one, that such interest or title made a necessity for his joining in the alienation which has no existence now; and that, therefore, the decisions under the former statute are of no authority in respect of this one. But it is to be said in answer to this that

the decision just referred to is expressly put upon the ground, not of any supposed title or interest in the husband, but, that the statute required his assent and concurrence to be expressed by joining in the conveyance, and it could not be expressed in any other mode. The present statute requires the expression of the husband's assent and concurrence in this mode. It was not so manifested in the attempted conveyance involved in this case. The instrument, we conclude, was no more or less than the void deed of the wife': Davidson v. Cox, 112 Ala. 513, 20 South. 500. In the subsequent case of Johnson v. Goff, 116 Ala. 648, 22 South. 995, the court adopted the above reasoning, and held that the assent and concurrence of the husband required by statute to give validity to a deed conveying the wife's lands, can be manifested only by his joining the alienation in such way as would be necessary if he owned the lands in severalty, and a deed purporting in the granting clause and body thereof, to be the deed of the wife, her name alone appearing therein, but which is signed and acknowledged by her and her husband, the latter's name appearing nowhere in the body of the instrument, and nothing appearing therein to indicate an intention on his part to become the grantor, is nothing more than the void deed of the wife, and inoperative and ineffective to convey her title to her land. The same doctrine appears to prevail in Kentucky, where it is held that the mere signing of the husband's name to a deed executed by his wife, of her lands, wherein his name does not appear, does not meet the requirement of the statute that the conveyance of the wife's separate estate must be by joint deed of husband and wife, and therefore such deed is void: Weber v. Tanner, 23 Ky. Law Rep. 1107, 64 S. W. 741.

We must respectfully dissent from the rule and the reasons therefor as announced by these cases, as we fail to see the necessity of naming the husband as a grantor of property in which it is expressly admitted he has no interest and this is especially so where the statute does not in express words provide that he shall join the wife as a grantor in the body of the deed, attempting to convey her property. Certainly, his assent to and concurrence in her conveyance of her lands, by signing and acknowledging her deed is all that should be required to make it efficacious to pass the title.

In Vermont, real estate conveyed to a wife is not her separate estate, unless the conveyance contains explicit words, shutting out her husband from marital rights in such estate, and in such case and in the absence of such words, and under the statutory system in force in that state, the husband has a freehold interest in such lands. Therefore, when he has a freehold interest in her lands, by virtue of the marital relation, it is essential to make the deed of the wife to her lands good and effective to pass the title, that her husband be joined with her as a grantor in the body of the deed, and it is not enough that he merely sign and join in the execution of

her deed: *Dietrich v. Hutchinson*, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810. The court attempted to justify its holding in the following language: "The statute provides that a husband and wife may, by their joint deed, convey the real estate of the wife as she might do by her separate deed if unmarried (*Vermont Stats.* 2209); and that a married woman shall not convey or mortgage her real estate except by deed duly executed by herself and husband. There is more or less conflict in the cases as to what is a sufficient joining of a husband in his wife's deed of her real estate, to answer the requirements of the statutes in such case made and provided. But we think the weight of authority is that when the husband has a freehold interest in his wife's real estate by virtue of the marital relation, he must, in order to make her conveyance thereof good, so join therein as to pass his title, and that to do that, he must be named in the body of the deed as a grantor and use apt and sufficient words to convey, and that his merely executing a deed jointly with his wife in which she alone is named as grantor is not enough. An extended consideration of the cases is unnecessary. They are pretty fully reviewed in a note to *Payne v. Parker*, 25 Am. Dec. 226, in one to *King v. Rhew*, 23 Am. St. Rep. 82, and in 9 *American and English Encyclopedia of Law*, second edition, 110-113. Much of the conflict among them is more apparent than real, and grows out of the difference in statutes and in the marital rights of the husband in the wife's land. Thus in Maine, the statute requires 'the joinder of her husband,' but not, it is said, as a grantor, for he has nothing to grant but merely as an assenter for he has only the power to give or to withhold assent, and therefore it is sufficient where he signs and seals the deed without otherwise becoming a party to it: *Berry v. Clapp*, 80 Me. 277, 6 Am. St. Rep. 197, 13 Atl. 900. . . . In Connecticut the statute requires the deeds of married women to be 'executed by them jointly with their husbands,' and they hold that he who signs executes, and that the husband's name need not be inserted in the body of the deed: *Pease v. Bridge*, 49 Conn. 58"; *Dietrich v. Hutchinson*, 73 Vt. 138-140, 87 Am. St. Rep. 698, 50 Atl. 810. It certainly appears to us that the theory of the Vermont case is fallacious and that the cases cited therefrom maintaining the contrary rule contain the only true and satisfactory solution of this vexed question.

c. **If Ineffective as Deed may be Effective as Contract to Convey.**—Under the statutes at present in force in Alabama, the courts of that state maintain that a deed from a married woman conveying her lands wherein her husband does not join in the body thereof as a grantor, though void as a deed, is a valid contract to convey such lands, when the husband expresses in writing his assent to, and concurrence in, the execution of the deed, and the purchaser pays the purchase money and enters immediately into the actual, open, and notorious possession under a claim of ownership: *Murphy v.*

Green, 120 Ala. 112, 22 South. 112. Or if a husband signs and acknowledges his wife's deed as a grantor, but his name does not appear as such in the body of the deed, the instrument, though ineffective and inoperative as a legal conveyance of her lands, constitutes a valid contract to convey and the grantee takes the equitable title to the premises: *Rushton v. Davis*, 127 Ala. 279, 28 South. 476.

II. Joinder of Husband by Separate Instrument.

It has been held that a deed properly signed, executed, and acknowledged by a wife of her separate property, not signed by her husband, but with his assent on a separate instrument not under seal, but properly acknowledged, is sufficient to pass the title to the land: *Ingoldsby v. Juan*, 12 Cal. 564; and it has also been held that if a mortgage of her land by a married woman is drawn in terms which would be appropriate for a mortgage by her if she were a feme sole reciting the consideration and description of the property and using apt words for its conveyance and at its conclusion containing the following recital, "and I, husband of Emma F. Hamlin, hereby consent to the making and execution of this deed by her, and join her in its execution and the conveyance of the property," and both husband and wife duly execute and acknowledge the instrument, it is a valid mortgage, the words added by the husband being a sufficient compliance with the statute which requires the assent and concurrence of the husband to the alienation of his wife's land: *Interstate etc. Assn. v. Agricola*, 124 Ala. 474, 27 South. 247. On the other hand, there are cases holding that a husband cannot give his assent to his wife's conveyance by separate instrument so as to render her deed valid. Thus, in *Hammond v. Thompson*, 56 Ala. 589, it was decided that a deed of her statutory separate estate, executed by a wife alone, using apt words and reciting that she is a married woman, is void, as being the deed of the wife alone, and not the joint deed of husband and wife, although her husband executes another instrument under seal, on the same paper as the deed, and at the same time, declaring that he consents to, and approves of, such sale and conveyance by his wife. It has also been held that if a married woman executes a deed to her land without the joinder of her husband, who, however, at the time of the execution of such deed, executes a separate paper giving his consent to the execution of the deed by his wife, but this paper is not acknowledged or recorded until after the deed of his wife, such deed is invalid and does not convey the land to the grantee: *Ferguson v. Kinsland*, 93 N. C. 337.

III. Effect of Failure of Husband to Sign Deed.

While it appears that a deed of a married woman's land constituting her separate estate, in which the husband is required to

join under the statute, is void if it purports to be signed by both husband and wife, but is in fact signed by her alone while she is living with her husband: *McAnulty v. Ellison* (Tex. Civ. App.), 71 S. W. 670; yet, it is also true that a husband joins with his wife in the execution of a deed of her property, under a statute providing that a deed so joined shall bind the wife, by her signing his name to the deed by his authority, although he does not acknowledge it before the proper officer: *Dean v. Shreve*, 155 Ill. 650, 40 N. E. 204.

McDONNELL v. DE SOTO SAVINGS AND BUILDING ASSOCIATION.

[175 Mo. 250, 75 S. W. 438.]

BUILDING AND LOAN ASSOCIATIONS—Usury.—By-laws of a building and loan association fixing a minimum premium, greater than the legal rate of interest, at which loans may be made, are inconsistent with a statute requiring free and open competition in bidding for loans, and render a loan made thereunder usurious, although a larger bid is made therefor than the usurious rate arbitrarily made by such by-laws. (p. 602.)

INTEREST—Usury—"Legal Rate"—"Contract Rate."—A statute relating to usury and using the expression "legal rate of interest," means the statutory rate obtaining in absence of a contract fixing the rate, and not the rate which may be legally contracted for. The words therein, "contract rate," mean any rate above the "legal rate" which may be legally fixed by contract. (p. 604.)

CONSTITUTIONAL LAW.—Courts must Decline to pass upon the constitutionality of a statute under consideration unless it is necessary to do so to properly dispose of the question presented for determination. (p. 605.)

TRUSTEES in Deeds of Trust.—An Officer of a building and loan association may legally become a trustee in a deed of trust given to secure a loan made by such association. (p. 605.)

FORECLOSURE SALES.—Inadequacy of Price, in the absence of other considerations, is no ground for setting aside a foreclosure sale under a deed of trust, unless it is so gross and unconscionable as to shock the moral sense. (p. 606.)

ESTOPPEL IN PAIS —Waiver.—Although an estoppel in pais must generally be pleaded as a defense, such defense may be waived by the plaintiff in the case by proceeding with the trial without objection as if such defense relied upon had been pleaded. (p. 607.)

BUILDING AND LOAN ASSOCIATIONS—Usury—Estoppel to Plead.—Although under a by-law of a building and loan association a loan made by it is usurious, yet if property covered by a deed of trust given to secure such loan is sold under foreclosure for default in payment of interest and premium dues, and the mortgagor

solicits others to attend the sale and bid on the property, and himself attends and makes no objection to the validity of the loan or the manner of sale, he is estopped from setting the sale aside and the purchaser thereat takes title. (p. 608.)

J. J. O'Donohoe, for the appellants.

Campbell & Thompson and T. E. Ralston, for the respondents.

²⁵⁷ BURGESS, J. This suit was instituted by John McDonnell and Catherine McDonnell, his wife. Since the suit has been pending in this court John McDonnell died, and the suit was duly revived in the name of his heirs and the administrator of his estate. The purpose of the suit is to have canceled and set aside two certain bonds and two deeds of trust securing the same, executed by McDonnell and wife, to defendant Hartnett, ²⁵⁸ as trustee of the De Soto Savings and Building Association, as well as the sale of the property described in the deeds of trust by said trustee, and the deed by him to the defendant Anderson.

The petition is in two counts. In the first count it is alleged in effect that on the tenth day of April, 1895, plaintiffs, McDonnell and his wife, borrowed of defendant De Soto Savings and Building Association the sum of \$3,000, at the stipulated rate of fifteen per cent; that the premium for said sum was deducted and the balance of \$2,550 was paid to plaintiffs; that this loan of \$3,000 was on the 27th of August, 1897, secured by a bond and deed of trust on certain property on Bremen avenue, in the city of St. Louis, Missouri; that on the fourteenth day of May, 1896, McDonnell and wife borrowed of the defendant association, the sum of \$13,000, at the stipulated rate of interest of six per cent per annum; that from this sum, fifteen and one-half per cent premium was deducted, and a balance of \$10,985 was paid to McDonnell; that to secure the payment of said \$13,000 loan, McDonnell executed his bond and deed of trust on the same property on Bremen avenue. The petition then recites that from the tenth day of April, 1895, when the first payment on stock and interest was made, until the 19th of May, 1899, when the last payment on stock and interest was made, McDonnell paid to the association the sum of \$5,795. That since the 10th of April, 1895, McDonnell has been the owner of eighty shares of the stock of said defendant association, which stock, together with the earnings, profits, and dividends "aggregate a sum the exact amount of

which is unknown to plaintiff, but which should have been applied by said association to the payment of the loans aforesaid." That in said deed of trust Joseph P. Hartnett was made trustee, and that in said capacity he offered the property described in said deeds of trust for sale on the eighteenth day of July, 1899, and sold it to Lorenzo E. Anderson for the sum of ²⁵⁹ \$13,100, and executed to him his deed as trustee therefor; that said property was of the value of \$55,000 on the day of sale, and that plaintiffs had made all legal payments to the association that could be demanded, and were not delinquent at the time of the foreclosure under said deeds of trust.

The petition then closes with a prayer for relief, which is as follows: "Wherefore plaintiffs pray that the bonds aforesaid be delivered up to plaintiffs to be canceled; that said deeds of trust be ordered canceled on the records; that a general accounting be taken between plaintiffs and defendants, and the amount due defendants, if any, be judicially ascertained and determined; that defendants be ordered to pay to plaintiffs the difference between the actual value of said property and the amount that plaintiffs owe defendants, if any be so found to be due them, and for their costs in this behalf expended; and for such other orders, decrees, and judgments as may be proper in view of the premises."

The second count alleges that plaintiff borrowed from the association the amount stated in the first count, executed the bonds and deeds of trust mentioned in the first count; that the payments were deducted as alleged in the first count, and that plaintiffs had paid to the association the amounts stated in the first count. This count alleges that Joseph P. Hartnett, trustee in said deeds of trust "confederating with his codefendants, De Soto Savings and Building Association, and Lorenzo E. Anderson, to obtain said property for their own use, and to defraud plaintiffs of said property and in pursuance of this fraudulent design, claimed that plaintiffs were delinquent in payments under said deeds of trust, and caused the real estate described in said deeds of trust to be advertised and sold under both deeds of trust, the same being purchased by defendant, Lorenzo E. Anderson, colorably, and not for value, but for a pretended consideration of \$13,100, in order that he might ²⁶⁰ make such purchase, not for himself, but in reality for all of said defendants." The petition then alleges that the property was sold for a pretended consideration of \$13,100, while the property was, at the time of the sale, and is now worth \$55,000;

that said sale was made on the eighteenth day of July, 1899, and the trustee's deed made, executed and delivered by the trustee to said Anderson; that at the time of the foreclosure sale plaintiff had made all payments that could be lawfully demanded, and that they were not delinquent. Then follows the prayer for relief: "Wherefore, plaintiffs pray that the bonds aforesaid be delivered up to plaintiffs for cancellation; that said deeds of trust be canceled; that said sale be set aside and for naught held; and that the trustee's deed be canceled, and the title to said property be divested out of said defendants and vested in plaintiffs; that an accounting be had between the plaintiffs and defendants, and the amount found to be due, if any, by plaintiffs to defendants, be ordered to be paid, which plaintiffs are ready, willing and able, and hereby offer and agree to do, and for such further orders, decrees and judgments as may seem proper in view of the premises."

The De Soto Building and Loan Association and Lorenzo E. Anderson filed separate answers, but they are in all respects the same, except that the answer of Lorenzo E. Anderson differs from that of the association in this: he alleges that he bought said property not for himself or defendant association, but for the Wiggins Ferry Company.

Their answers allege that in April, 1895, plaintiff, John McDonnell was and for a long time prior thereto had been and that he continued to be until about July, 1898, a stockholder in the defendant association, and that until March, 1896, he was a director of said association. They then set out a number of the by-laws of the association, the section quoted having particular reference to the making of loans, and the foreclosure of ²⁶¹ securities. They then recite that in April, 1895, John McDonnell was the owner of eighty shares of stock of the association; that he made application for a loan of \$3,000, and having bid fifteen per cent therefor at auction, and being the highest bidder, said sum was knocked down to him by the defendant association, and was, less the premium, paid to said McDonnell; that to secure the payment of said sum, McDonnell gave a deed of trust on property on Prairie avenue, in the city of St. Louis; that in September, 1897, upon McDonnell's application, said loan of \$3,000 was transferred from the property on Prairie avenue to the property described in the petition, on Bremen avenue, and that said bond and deed of trust on the Prairie avenue property were canceled and released, and the association took from McDon-

nell a bond and deed of trust to secure said loan of \$3,000 on the said Bremen avenue property; that said \$3,000 deed of trust has not been paid, and that there still remained due to the association on said loan, the sum of \$2,415.56, which was paid out of the proceeds of the foreclosure sale hereafter mentioned; that on May 13, 1896, McDonnell applied for a loan of \$13,000 on his remaining sixty-five shares of stock, and at a meeting of the association held on that date, bid fifteen and one-half per cent therefor as premium at auction, and said sum was knocked down to him as the highest bidder; that the premium of fifteen and one-half per cent was deducted, and the remainder paid to plaintiffs; and to secure the payment of said loan of \$13,000, plaintiffs executed a bond and deed of trust upon the Bremen avenue property; that thereafter plaintiff, McDonnell, continued to pay monthly dues and interest upon the two loans of \$3,000 and \$13,000 until he became delinquent; that commencing with August 11, 1896, McDonnell began to be delinquent in his payments upon account of his eighty shares of stock pledged as aforesaid, said payment being \$80 per month dues and \$80 per month interest; that the association was lenient with ²⁶² him with respect to its right to foreclose, and allowed him a reasonable chance to pay up before finally proceeding to sell his property; that under the terms of section 9 of its by-laws, if the borrower "failed: totally in his payments during the space of six months, or if the balance due by the borrower has been allowed to accumulate until it equals the sum of six months' dues and interest, then the board may, in its discretion, proceed at any time to advertise for sale, under said deed of trust, the property pledged to the association by such borrower." That McDonnell had for the period of six consecutive months prior to the date of the sale thereafter mentioned, failed to pay the dues, interest, fines and other charges required of him by the by-laws, and had become indebted to the association in a sum equal to the gross amount of the dues, interest, fines and other charges for the period of six months upon both said deeds of trust; that thereupon in pursuance of law, and the by-laws of said association, the board of directors of the said association requested the trustee named in said deeds of trust to proceed to advertise and sell said property described in said deeds of trust; that the sale was duly and legally advertised in accordance with the terms of said deeds of trust, for a period of twenty days in the "St. Louis Star," and on the 18th of July, 1899, the

property was by said trustee sold pursuant to the terms of said deeds of trust, to Lorenzo E. Anderson, the highest and best bidder, for \$13,100, which sum was thereafter received by the trustee from Anderson, and the trustee executed and delivered to him his deed to the said Bremen avenue property; that the trustee paid out of the proceeds of said sale the charges, costs and expenses connected with the execution of his trust, the amount due the association under the said \$13,000 deed of trust, and under the said \$3,000 deed of trust, leaving a balance in his hands of \$15.57.

The second count, after generally denying the allegations of the petition, sets up the same state of facts ²⁶³ as alleged in the first count heretofore recited, and concludes as follows:

"Defendant says that said Anderson bought in good faith, and for the actual consideration named, to wit, \$13,100, and neither this defendant nor the said trustee had any interest directly or indirectly in said purchase. This defendant says that the said trustee paid out of the proceeds of the sale the charges, costs and expenses connected with the execution of his trust, and the amount due this defendant under said \$13,000 deed of trust, and the amount due to it under said \$3,000 deed of trust, leaving a balance in his hands of \$15.57."

Joseph P. Hartnett filed a separate answer, and after a general denial pleaded as new matter that he was named as trustee in the deeds of trust mentioned in plaintiff's petition, and that there having been default made by McDonnell under the \$13,000 deed of trust, he was requested by the association, the holder of the bond secured by said deed of trust, to advertise and sell the property described therein; that on the twenty-third day of June, 1899, he proceeded to advertise said property for sale in the "St. Louis Star"; that said advertisement was continued in said paper for twenty days, and upon the day advertised to be the day of sale, which was July 18, 1899, he sold in accordance with the requirements of said deed of trust and said advertisement, the property therein described, at public venue, to the highest bidder, at the east front door of the courthouse in the city of St. Louis, and Lorenzo E. Anderson, being the highest bidder, the property was knocked down to him at the sum of \$13,100 cash, which price Anderson paid to Hartnett on the same day, and Hartnett, as trustee, applied the same to the payment of the costs and expenses of the sale, to the amount due as he was informed, to the defendant association under the \$13,000 and \$3,000 deeds of trust,

leaving a balance in his hands of \$15.57, which he was, and has always been, ready and willing to pay plaintiffs; that the sale was made by him in good faith, ²⁶⁴ and in strict accordance with his powers and duties as trustee; that he paid out the proceeds of said sale as he was required legally and equitably to do; that said Anderson was a bona fide purchaser, and that defendants were not interested directly or indirectly in said purchase, "nor in anywise in said sale except as trustee as aforesaid." His answer to the second count is the same as his answer to the first count.

The replication to the answer of the association pleads that the amounts charged plaintiff by the defendant association as dues, interest, fines, premiums, and other charges, were illegal and usurious; that the sections of the by-laws set up in the association's answer, as well as section 2814 of the Revised Statutes of 1889, concerning premiums, on which said by-laws are alleged to be based, are in conflict with and contravene section 53, article 4, of the constitution of the state of Missouri, and also that they violate sections 5973, 5975 of the Revised Statutes of 1889, and are also in violation of the Laws of 1891, pages 169 and 170.

The replication to the answer of Lorenzo E. Anderson states that the by-laws concerning interest, dues, and other charges, were illegal because of the facts stated in the replication to the answer of the De Soto Savings and Building Association, and that said Anderson and the Wiggins Ferry Company knew this fact; that Anderson did not purchase said realty in good faith, and that he and the Wiggins Ferry Company "had full knowledge and notice of the wrongful and unlawful acts of said Anderson's codefendants." The remainder of this replication sets up the illegality and unconstitutionality of the by-laws and statutes in the same manner in which they are pleaded in the replication to the answer of the association.

The replication to the answer of Joseph P. Hartnett sets up the illegality of the by-laws and the unconstitutionality of the by-laws, alleging that they contravene section 54 of article 4 of the constitution of the state ²⁶⁵ of Missouri, and states that Hartnett has been since April, 1895, a shareholder in the defendant association, a member of its directory, president thereof, and knew that the by-laws were illegal, and that he also knew that plaintiffs were not in default at the time he advertised said property for sale. The trial resulted in favor

of defendants, dismissing plaintiff's bill, and judgment against them for costs. They appeal.

The facts are briefly stated by counsel for the defendant association and Hartnett, as follows: On the tenth day of April, 1895, John McDonnell, since deceased, was the owner of eighty shares of stock in the defendant association. He was also at that time a director in the association, and continued to be such until the year 1898. On that day he borrowed from the association, on fifteen shares of his stock, the sum of \$3,000 from which was deducted \$450, the premium bid at auction by McDonnell for the preference, and the balance of \$2,550 was paid by the association to him. To secure the payment of said \$3,000 McDonnell executed his bond in favor of the association in that amount, bearing six per cent interest, and a deed of trust on property on Prairie avenue, in the city of St. Louis, Missouri.

On the fourteenth day of March, 1896, he again made application for a loan of \$13,000, on his remaining sixty-five shares of stock, and said sum being put up at auction, at which he was the highest bidder, was awarded him on his bid of fifteen and one-half per cent. The premium of \$2,015 was deducted, and the balance of \$10,985 was either given to him or paid out at his direction. To secure the payment of this sum McDonnell executed in favor of the association his bond for \$13,000, bearing interest at six per cent per annum, and deed of trust on property of McDonnell situated on Bremen avenue, in the city of St. Louis, Missouri.

266 About August 24, 1897, at the request of McDonnell, the association canceled the first bond and deed of trust, and accepted in lieu thereof a new bond for the same amount and a second deed of trust to secure the payment of the same upon the Bremen avenue property also. The first bond and deed of trust were canceled, and McDonnell executed a new bond for \$3,000, bearing six per cent interest, and a deed of trust on the Bremen avenue property.

Said bonds were alike in form, and each provided as follows:

"And that they will faithfully pay all dues and fines on said stock, and also the interest aforesaid, and perform any other obligation required of them by the by-laws, rules and regulations required, or may be by said association or the board of directors, and keep the association free from all losses and damages by reason of said loans.

"Now, therefore, the condition of this obligation is such that if the above bound obligors, their heirs, etc., shall and do well and truly pay or cause to be paid, unto the above-named association, its attorney, successors or assigns, the sum of \$13,000 in one case and \$3,000 in the other, on account of the stock in said association, and the interest on said loan when due (monthly dues and interest being payable on the second Wednesday of each and every month from the date of these presents until the dissolution of the association), etc., then the above obligation to be void, provided, however, that it is expressly agreed that if at any time default shall be made in the payment of said monthly dues, interest or fines, and the same shall remain unpaid for the space of six months after any payment thereof shall fall due, then the whole principal debt, with interest thereon, from the date of these presents to the date of sale, at the rate of six per cent per annum, shall, at the option of the association, its successors and assigns, immediately become due and recoverable, and the payment of said ²⁶⁷ principal sum and all interest thereon, as well as dues and fines then due and payable, may be enforced and recovered at once by sale under said deed of trust of the property described therein, according to the terms and provisions of said deed of trust."

In each deed of trust it was provided as follows: "That if at any time default should be made in the payment of monthly dues, interest or fines, and the same shall remain unpaid for the space of six months after any payment thereof shall fall due, then the whole principal debt shall, at the option of said association, its successors and assigns, immediately thereupon become due and recoverable, and payment of said principal sum, and all interest thereon, as well as monthly dues and fines then due, may be enforced and recovered at once by sale, under the deed of trust, of the property herein described, according to the terms and provisions of this deed of trust. . . . But if the said parties of the first part, or their legal representatives, shall fail to pay or cause to be paid unto the said association, its attorneys, successors or assigns, the monthly installments of dues, interest and fines . . . as above provided and according to terms, tenor and effect of the said bond, then this deed shall remain in force, and the said party of the second part may proceed to sell," etc.

The only difference in the bonds is the amount agreed to be paid, viz., in the one case McDonnell agreed to pay on the sixty-five shares of stock the sum of \$130 a month, \$65 being

payment of \$1 a month on each share of stock, and \$65 being interest at six per cent on \$13,000; and in the other case, viz., the \$3,000 loan, McDonnell promised in the bond to pay \$15 a month on his fifteen shares, and \$15 a month interest, being six per cent of \$3,000. Accordingly McDonnell was under obligation to pay to the association monthly, the sum of \$80 on dues, and \$80 interest, or the aggregate of \$160 per month.

²⁶⁸ From the month of April, 1897, to the month of December, 1897, a period of eight months, McDonnell paid no dues, interest or fines. He then began his payments of \$160 a month, and continued to make them monthly until May, 1898, but failed to pay his dues, interest and fines for the eight months from April to December, 1897, though often requested by the association to do so.

The association decided in June, 1898, to sell the security, viz., the Bremen avenue property, and requested Hartnett, the trustee, to do so. He gave the required twenty days' public advertisement through the "St. Louis Star," and on July 18, 1898, sold the property at the east front door of the courthouse in the city of St. Louis, to Lorenzo E. Anderson, the highest bidder, for \$13,100. At this time McDonnell owed to the association, after allowing him all just credits, the sum of twelve thousand nine hundred and some odd dollars. He was present at the sale and offered no objection to the sale of the property or the manner in which it was being sold. He was a director of the association when both advancements were made.

Section 1 of the by-laws of the association provides that no loan shall be made at a less premium than ten per cent.

It is argued by plaintiffs that because the by-laws of the association provide that "no loan shall be made at a less premium than ten per cent," there is thereby fixed an arbitrary rule, which in effect told McDonnell that he could not procure a loan from the association at less than ten per cent premium, and that although McDonnell bid fifteen per cent premium on the \$3,000 borrowed, and fifteen and one-half per cent upon the \$13,000, the premiums paid by him were usurious. In support of this contention plaintiff relies upon the case of *Price v. Empire etc. Assn.*, 75 Mo. App. 551, in which it is held that as the loan was not sold at an open meeting of the directors, but the premium or costs of ²⁶⁹ preference was

fixed by the arbitrary demand of the corporation, the premium paid was usurious.

But in the case at bar the evidence clearly shows that the loans to McDonnell were made at public meetings of the board held for that purpose and that he was present in person upon each occasion, and was the highest and only bidder for the \$3,000 loan upon which he bid a premium of fifteen per cent, and for the \$13,000 loan a premium of fifteen and one-half per cent. While McDonnell testified with respect to the first-named loan, that Brady, the secretary of the association, told him that he could get it, but that he would have to pay pretty high for it, about fifteen per cent, and with respect to the \$13,000 that Brady told him he would have to pay fifteen and one-half per cent premium upon it, and in consequence of these statements he bid the amount suggested by Brady, this cannot be construed into an agreement between the association and McDonnell by which he was to have the loans at the premiums bid by him, but was merely the expression of opinion by Brady as to the amount of premium he, McDonnell, would have to pay if he secured the loans. There is nothing disclosed by the record to justify the conclusion or inference that McDonnell was constrained by any arbitrary action of the defendant association or its officers in bidding for the loans or either of them, unless it was by the ordinance fixing the minimum rate of premium at ten per cent. It has been held by the courts of appeals in numerous cases arising under the act of 1889, that if the loan was made in the manner provided by that statute, it was a valid loan, though the premium, interest, etc., aggregated more than a lawful rate of interest. But if the statute was disregarded it would not protect the loan from the charge of usury, and that where the association had a fixed minimum premium at which they made loans, that was an act in disregard of the statute and the loan usurious: *Brown v. Archer*, 270 62 Mo. App. 277; *Moore v. Cameron Building etc. Assn.*, 74 Mo. App. 468; *Barnes v. Missouri etc. Bldg. Assn.*, 83 Mo. App. 466; *Clark v. Missouri etc. Assn.*, 85 Mo. App. 388; *Fry v. Missouri etc. Bldg. Assn.*, 88 Mo. App. 289; *Cover v. Missouri etc. Assn.*, 93 Mo. App. 302; *Arbuthnot v. Brookfield etc. Bldg. Assn.*, 98 Mo. App. 505, 72 S. W. 132.

But the loans in the case at bar were made under the present statute and are governed by section 1362 of Revised Statutes of 1899, which does not require bids for money offered to be loaned to be made at competitive bidding in open meeting

called by the directors, but provides that loans shall be let to "shareholders who shall bid the highest premium." That McDonnell as a stockholder was entitled to bid for the loans, and if the highest, or the only bidder, entitled to the loans, we think clear: *Ruppel v. Missouri etc. Assn.*, 158 Mo. 613, 59 S. W. 1000. But the question is, whether the by-law fixing a minimum premium at ten per cent, which defendant association admits in its answer was in force at the time the loans were voted, made them subject to the defense of usury, though the premiums actually received were in one instance only five, and in the other only five and one-half per cent in excess of the minimum rate prescribed by the by-law? The authorities upon this feature of the case are not in harmony, but in this state the rule seems to be that such a by-law is inconsistent with the statute which requires free and open competition. Under this by-law the bidder was compelled to pay more than ten per cent, while there could have been none under that rate because of the arbitrary minimum rate fixed by by-law. While the case of *Arbuthnot v. Brookfield etc. Bldg. Assn.*, 98 Mo. App. 505, 72 N. W. 132, was under the law of 1889, what was said with respect to a by-law of the association fixing the minimum rate of premium at sixteen per cent is directly in point in this case. It is as follows:

"Defendant had a by-law declaring that the premium to be received for preference of loans should not ²⁷¹ be less than sixteen per cent; that when this loan was let to plaintiff the secretary of the association who cried the bids, opened the auction by announcing that no bid would be received under sixteen per cent; that thereupon bids were made over that rate until the loan was sold to plaintiff at twenty-five and one-half per cent. In our view, that manner of letting the loan gave effect to the objectionable by-law, and was in the face of the statute directing free and open competition. The by-law was enforced by the opening declaration of the secretary. The bidders were compelled to bid more than sixteen per cent, and, while there was competition above that rate, there could be none under that rate. It is manifest that there can be no fair and free letting of a loan, when a certain rate is determined upon beforehand, under which no loan would be made. The by-law arbitrarily fixed upon sixteen per cent as the rate, unless the association could get more. The by-law itself fixed a usurious rate, and, being fixed, it was not protected by the statute. When the association adopted the by-law, and en-

forced it through the act of its secretary, it was demanding usury in a manner unauthorized, and therefore it placed itself outside the protection of the statute; and the fact that it got more usury than it demanded in the by-law does not relieve the transaction of its illegality. We are cited to Endlich on Building and Loan Associations, section 411, but the citation does not support defendant. That author says that if the premium exacted was the result of fair competition, without reference to the illegal by-law, 'no bid being refused because below the established minimum, nor raised for the sole purpose of covering it,' the borrower has no cause of complaint. But in this case, while no bid was refused for the reason that it was below the rate named in the by-law, yet the bidders were advised at the outset that they would not be permitted to bid below that rate."

Defendants contend that even if the premiums ²⁷² were arbitrarily fixed, and charged arbitrarily with reference to the minimum premium by-law, yet the record does not disclose that the premium, together with the interest, could exceed the rate which McDonnell and defendant association could agree upon. But we are unable to concur in this view. The bonds in the case in hand drew, according to their provisions, six per cent interest per annum, which in this state is the legal rate, but which may be made eight per cent by contract. And so the former is generally termed the "legal rate," and the latter, the "contract rate." The statute (Rev. Stats. 1899, sec. 3709) provides that "usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness." Defendant claimed, at the argument, that, as eight per cent may be legally contracted for, the statute when using the expression "with legal interest," meant the interest stipulated in the contract, provided it was within the rate which could be legally contracted for. We think not. The statute, in using the expression "legal rate of interest,"

meant the statutory rate which obtains in the absence of a contract. Usury avoids the contract as to interest, and the statute disposes of it by giving the creditor the statutory rate, and applying the overplus toward the payment of the principal debt: *Arbuthnot v. Brookfield etc. Bldg. Assn.*, 98 Mo. App. 505, 72 N. W. 132.

In this case, as we have said, there was an illegal by-law ²⁷³ fixing a minimum premium of ten per cent. There was no written application for either of the loans, and the only agreement in writing to pay interest is to be found in the bonds. So that any premium paid by McDonnell, however small, was usurious under the facts disclosed by the record. The question then presents itself as to how these matters are to be adjusted. As was said in *Laidley v. Cram*, 96 Mo. App. 580, 70 S. W. 912: "If the premiums are treated as interest on the assumption that they were fixed arbitrarily instead of by free competition, the total rate per year of interest charged cannot be calculated on the facts before us; for, to do that exactly, the loans would have to run until the stock matured, while, to do it approximately, testimony is needed as to the time when it will probably mature": *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145; *Association v. Flach*, 1 Cin. Sup. Ct. Rep. 468; *Hagerman v. Ohio etc. Assn.*, 25 Ohio St. 186.

Plaintiffs challenge the constitutionality of the building and loan association statute upon the ground that said act, and particularly that section which provides that the premiums bid in accordance with the requirements of the statute, shall not be considered as interest or render the loan usurious, violates that provision of the constitution which prohibits the legislature from passing "any local or special law fixing the rate of interest." But as we have indicated that the premiums bid were not in accordance with the requirements of the statute and therefore illegal, it is unnecessary to pass upon the question presented upon this feature of the case, and we must decline to do so.

Plaintiffs complain in their brief that the trustee in the deeds of trust was an incompetent person to discharge the duties of those positions because an officer in the association, but there is no merit in this contention. Nor is the assertion that he was not present at the time ²⁷⁴ of the sale of the property under the deeds of trust, sustained by the record.

There is no merit in the contention of plaintiffs that the sale of the property should be set aside upon the ground of

inadequacy of price. It is a well-established rule in equity that mere inadequacy of price, in the absence of other considerations, is no ground for setting a sale aside, unless it be so great and unconscionable as to shock the moral sense.

Bispham in *Principles of Equity*, sixth edition, section 219, says: "Ordinarily, inadequacy of consideration will be insufficient to set a bargain aside, or to justify a refusal to enforce its specific performance. Where, however, the inadequacy is so great as to 'shock the conscience' (which is the phrase usually employed) contracts may be rescinded. . . . A case, therefore, of fraud from inadequacy of consideration, pure and simple, and unmixed with any other kind of fraud, is of very rare occurrence. Nevertheless, the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is 'an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.' The relief, however, in such cases is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby": *Holmes v. Fresh*, 9 Mo. 201. The doctrine thus announced is the well-settled law of this state.

Defendants contend that, as McDonnell was present at the trustee's sale, and interposed no objection thereto or to the manner in which the property was being sold, he and his heirs are estopped in equity, morals and conscience, from questioning the validity thereof. Upon the other hand, plaintiffs insist that no such defense is pleaded, and in order to be available as such this should ²⁷⁵ have been done. While the general rule is in accordance with plaintiffs' contention, it is not under all circumstances absolutely necessary that estoppel should be pleaded in order to be available as a defense, but like many other defenses it may be waived by the plaintiff in the case by proceeding with the trial of the case without objection as if the defense relied upon had been pleaded. This precise question was before this court in *Price v. Hallett*, 138 Mo. 561, 38 S. W. 451, in which Gantt, P. J., speaking for the court said:

"It has often been decided by this court that estoppel in pais must be pleaded: *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Avery v. Kansas City etc. R. R. Co.*, 113 Mo. 561, 21 S. W. 90. It was so held on an objection to testi-

mony in *Bray v. Marshall*, 75 Mo. 327. In *Noble v. Blount*, 77 Mo. 235, it was said there was neither a pleading nor evidence to justify such an instruction. It seems to us this doctrine has peculiar weight when invoked against the admissibility of evidence when no issue of estoppel has been tendered in the pleadings, or when an estoppel in pais is urged for the first time in this court, but where parties have permitted an issue of this kind to be raised by the evidence without objection, and have had full opportunity to try the issue, we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies, and this court has held that it was too late after trying the case as if a reply had been filed to claim that the answer was admitted. Had a timely objection been made when this evidence tending to show an estoppel was offered as against Benecke, it would have been excluded, or the court would have permitted an amendment pleading such estoppel, but no such objection appears to have been made at that time, and now that the evidence has been heard and the instruction given upon it, we think it is too late to raise the question of pleading on that point."

The same rule applies alike in law and equity cases: ²⁷⁶ *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424. In that case, in discussing the doctrine of equitable estoppel, Sherwood, J., in speaking for the court, said: "The same principle is forcibly asserted in *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, where no statements were made, no active inducements held out, nor encouragement given by defendant who was grantee in the deed under which he claimed, but the grantor remained in possession, and from time to time sold portions of the land, and improvements thereon were made in full view of the defendant's residence, some of the purchasers being known to the defendant; and Chancellor Kent, when commenting on this state of facts and the acts of the defendant, said: 'He preserved a studied silence, and gave no notice to those purchasers, or to the world, of his title. After this, he cannot be permitted to start up with a secret deed . . . and take the land from bona fide purchasers under the testator' (i. e., Phillip Wendell, who had made the deed to the defendant). If the plaintiff had been present the next day, when the defendant's verbal contract with Hughes was consummated by purchase and deed, and had remained silent, there is no con-

flict in the authorities that this would have estopped him as against the title of the defendant then and thus acquired. And his standing by and saying nothing, would have been regarded, in such circumstances, a holding out tacit inducements, or encouragements, to the defendant to purchase, or else as being so culpably negligent that it would amount to the same thing. . . . For 'the estoppel may arise, as we have intimated, from misleading silence or passive conduct joined with a duty to speak': Bigelow on Estoppel, 492. . . . This doctrine of equitable estoppel lies at the foundation of morals; especially concerns conscience and equity; under its benign rule, entitled as it is, like other equitable doctrines, to a fair and liberal application, fraud is suppressed, and honesty and fair dealing promoted; ²⁷⁷ conduct becomes equivalent to representations, and acts to direct statements. Such estoppels may be given in evidence, and operate as effectually as technical estoppels; they cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor hampered by the narrow confines of a technical formula."

McDonnell was a director in the present De Soto Savings and Building Association from March, 1895, to 1898. He knew defendant Hartnett, and that he was president of said "association," and trustee in both these deeds of trust at the time they were executed. He knew Mr. Brady, the secretary of said "association," and that he acted as auctioneer at the sale. He complained of neither of these matters in the amended petition. He knew that his property was to be sold under the deed of trust, before the sale, and he solicited Zelle Brothers, who held a third deed of trust for \$3,000 on the property, to be present and bid. He and the officers of said "association" alone knew the facts making these loans usurious, if any such usury be held to exist. He was present at the sale, and knew (so he testifies) that in addition to Mr. Ryan, who was present and bid at said sale for said "association," there were two other bidders. Yet, in view of all this knowledge, John McDonnell stood by at the sale of his property, under his own deed of trust, and made on account of his default in payments, and made no protest against the same, or objection thereto.

Our conclusion is that the judgment should be affirmed as to the defendants Hartnett and Anderson, and reversed and remanded as to the defendant, De Soto Savings and Building

Association, to be tried in accordance with the views herein expressed.

It is so ordered.

All of this division concur.

Usury is a moral taint wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law: *Pacific States Sav. etc. Co. v. Hill*, 40 Or. 280, 91 Am. St. Rep. 477, 67 Pac. 103; *Falls v. United States Sav. etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194, 13 South. 25. As to the effect of premiums exacted by building and loan associations in excess of the lawful rate of interest, either when taken alone or added to the interest charged, see the monographic notes to *Robertson v. Homestead Assn.*, 69 Am. Dec. 160-162; *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201; and the subsequent case of *Washington Investment Assn. v. Stanley*, 38 Or. 319, 63 Pac. 489, 84 Am. St. Rep. 793, and authorities cited in the cross-reference note thereto. In *Meroney v. Atlanta Bldg. etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924, it is held that penalties, premiums, or fines, amounting to more than legal interest, and imposed for the nonpayment of money, are usurious.

The Defense of Usury is not available after foreclosure and when others than the parties to the original contract have in good faith acquired an interest in the property: *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727. See, also, *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317.

Courts will not Decide Constitutional Questions when they can perceive another ground upon which properly to rest their decisions: *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280, 64 N. E. 661.

ROSENCRANZ v. SWOFFORD BROTHERS DRY GOODS COMPANY.

[175 Mo. 518, 75 S. W. 445.]

TROVER AND CONVERSION—Possession of Goods.—If goods have been delivered to a carrier by a shipper to be transported and delivered to himself as consignee, he has the possession of the goods and by virtue thereof has the right to recover them or their value from anyone who seizes them en route except the true owner, and if a third person wrongfully obtains possession of them, he cannot defeat the shipper's action of trover for their value, by showing title in another, without connecting himself with the right of such other. (p. 615.)

ATTACHMENT as Affecting Title.—The title of one, in the actual possession of goods is not affected by attachment suits which are not prosecuted to judgment. (p. 616.)

TROVER AND CONVERSION—Attachment—Dismissal.—If the owner of goods turns them over to another, who has them shipped in his own name by a carrier to himself as consignee, and a creditor of the owner attaches them while in transit, induces the at-

taching officer to turn them over to him and then dismisses his attachment, he becomes a trespasser, and has no such legal possession of the goods as is a defense to an action for their conversion by the shipper, although the claim of the latter to them is founded in fraud. (p. 616.)

TROVER AND CONVERSION—Dismissal of Attachment—Trespass—Removal of Goods—Estoppel.—If a creditor of the owner of goods which are in the legal possession of a third person, after attaching them and gaining possession of them from the attaching officer, dismisses his attachment, he becomes a trespasser, and if he then transports the goods to another state, and again attaches them, prosecuting his attachment there to judgment, such judgment is void for want of jurisdiction, and no defense to a suit for conversion by the person entitled to the legal possession of the goods; nor is the latter estopped to question the jurisdiction of the court rendering such judgment, although his claim to the goods is founded in fraud. (p. 617.)

WRONGFUL ATTACHMENT as Defense to Conversion.—A person who has unlawfully and wrongfully obtained the possession of, and attached goods, and afterward sold them, under the judgment of a court which has no jurisdiction, cannot, in a suit for their conversion by one entitled to their legal possession, justify the seizure, possession and sale of the goods on the ground that the claim of the person entitled to their legal possession is founded in fraud of the rights of the former as a creditor. (p. 618.)

TROVER AND CONVERSION—Lien for Freight Charges as Defense.—A carrier's lien for freight charges cannot be sold or assigned, and if a creditor of the true owner of goods pays the freight charges thereon and takes an assignment of the carrier's lien, thereby obtaining possession of the goods, such lien is no defense in a suit for the conversion of the goods by one who is entitled to the legal possession thereof. (p. 619.)

ESTOPPEL cannot Exist unless the person who alleges it relied upon some representation of the other, and was induced to act by it, and thus relying and induced did take some action. (p. 622.)

TROVER AND CONVERSION—Estoppel to Maintain—Wrongful Attachment.—A statement by the purchaser of goods that he is indebted to a certain creditor in a specified sum, who is willing to carry the indebtedness and not allow it to bother the purchaser or interfere with his paying other creditors, verified by such creditor, after a sale of goods to such purchaser, does not estop such creditor from maintaining an action for the conversion of the goods of the purchaser in his legal possession, wrongfully attached by the creditor making such sale and to whom the statement was made. (p. 622.)

Wollman, Solomon & Cooper, for the appellant.

Ellis, Cook & Ellis, for the respondent.

523 GANTT, P. J. This is an action of trover and conversion to recover the value of thirteen cases and seven bales of dry goods, clothing, etc., and was brought and tried in the Jackson circuit court, and resulted in a verdict for defendant. Plaintiff appeals.

On November 4, 1895, one Herman Goldberg, a merchant of Raton, New Mexico, sold and delivered these goods to the plaintiff, Bertha Rosencranz. Swofford Brothers Dry Goods Company was and is a wholesale clothing house of Kansas City, Missouri. Mrs. Bertha Rosencranz, the plaintiff, is a citizen of Chicago, Illinois, and her husband, a brother in law of Goldberg. Goldberg had been dealing with Swofford Brothers for some time prior to August 24, 1895, and that company had sold him goods on credit, but not in large quantities. On the last-mentioned date Goldberg came to Kansas City to buy a bill of goods of Swofford Brothers and others. On that day he made a statement of his financial standing to Swofford Brothers in which it appears his total assets were \$7,550 and his liabilities \$2,621. Among his liabilities he scheduled a debt for borrowed money to J. B. Rosencranz for \$2,100, and gave as reference J. Rosencranz, 215 Halstead street, Chicago. At the same time he stated that J. Rosencranz was his brother in law, and the debt of \$2,100 was the balance of purchase price of original stock bought by Goldberg of Rosencranz, and the latter was willing to carry said indebtedness, and not allow it to bother him in paying his other creditors, and thereupon Swofford Brothers sold him goods to the amount of \$1,374.98. On the second day of October, 1895, after the shipment of the goods, the credit man of Swofford Brothers, in the name of said firm, wrote J. Rosencranz the following letter:

"Kansas City, Mo., 10-2-'95.

"J. Rosencranz, 215 Van Buren St., Chicago, Ills.

"Dear Sir: In a statement rendered us in August last by Mr. Herman Goldberg of Raton, N. M., he gave ⁵²⁴ us among his liabilities an indebtedness to you of \$2,100. He explains to us that you are his brother in law and that this is a balance on the purchase price of the original stock bought from you. He also says that you are willing to carry this indebtedness for him and not allow it to bother him or interfere with his paying his other creditors. His account with us has so far been satisfactory, and if his indebtedness to you does not bother him, he offers a fair risk. We would like to hear from you direct as to the correctness of his statement. We inclose stamped envelope for your reply.

"Yours truly,

"SWOFFORD BROS. DRY GOODS CO."

And on October 6, 1895, the following reply was received:

"Chicago, Ill., 10-5-'95.

"Messrs. Swofford Bros., Kansas City, Mo.

"Gentlemen: Yours of recent date was received by me. Replying to same, I will say that the statement made to you in August last by Herman Goldberg of Raton, N. M., regarding the indebtedness to me of \$2,100, was correct.

"Yours respectfully,

"B. ROSENCRANZ."

The plaintiff offered evidence that afterward on the third day of November, 1895, the plaintiff through her husband J. Rosencranz, acting as her agent, delivered the goods for whose conversion this action was commenced, to the Atchison, Topeka and Santa Fe Railroad Company, a common carrier engaged in transporting merchandise from Raton, New Mexico, to Chicago, Illinois, and received a bill of lading in her favor in due form, whereby said company agreed to deliver said goods to her in Chicago, Illinois; that Kansas City, Missouri, is on the line of said railroad between Raton and Chicago. That the defendant, Swofford Brothers, on the 7th day of November, 1895, sued out an attachment for \$1,385.80 in the circuit court of Jackson ⁵²⁵ county, Missouri, at Kansas City, in favor of said Swofford Brothers Dry Goods Company and against H. Goldberg, on the ground of nonresidence, and under said writ the said defendant directed the sheriff of Jackson county, Missouri, to attach and take from the possession of the said railroad company, all of the goods described in the petition, and said sheriff, on the eighth day of November, 1895, attached and took said goods out of the possession of said railroad company in Kansas City, Missouri. That afterward, on the ninth day of November, 1895, said Swofford Brothers Dry Goods Company dismissed its said attachment suit, and on the 11th of November, 1895, said sheriff released said goods. No other proceedings were had against said goods in Jackson county, Missouri. By direction of the defendant, the sheriff turned the goods over to H. Leftwitch, an employé of defendant, and Joseph H. Roy, an employé of defendant's attorneys.

Prior to the commencement of the suit in Jackson county, Missouri, the Swofford Brothers Dry Goods Company, having learned of their shipment from Raton, brought an action by attachment in Johnson county, Kansas, and summoned the railroad company as garnishee. The sheriff of Johnson county, Kansas, did not succeed in seizing the goods, and it was learned they had gone into Kansas City, Missouri, where,

as already said, they were levied on by the sheriff of Jackson county, Missouri, and removed from the cars.

It seems this seizure aroused the railroad company, and the Swofford Brothers being anxious to avoid controversy with the railroad, which had a lien for its freight charges, it was stipulated that the railroad should receive its earned freight. Thereupon Joseph H. Roy took an assignment from the railroad company of its claim for freight lien on the goods, and the goods were then delivered to Mr. Leftwitch, an employé of defendant, Swofford Brothers, under the ⁵²⁶ direction of their attorneys. After that the suit in Jackson county, Missouri, was dismissed.

Thereupon by direction of Swofford Brothers, or their attorneys, the goods were then placed in wagons and driven across the state line into Kansas.

The money which was paid by Roy to satisfy the freight bill was paid by Swofford Brothers. When they reached Kansas, Cummins, the deputy sheriff of Wyandotte county, Kansas, under the direction of Swofford Brothers, levied upon the goods. They were marked B. Rosencraz, Chicago, Illinois. This levy was made under a writ of attachment issued by the clerk of Johnson county, Kansas, in the suit commenced there as already noted. It seems no publication was made in this suit within the forty days required by the laws of Kansas, and subsequently this suit, like the one in Jackson county, Missouri, was also dismissed, and no further steps taken in it, but prior to its dismissal and while the goods were still in the hands of the sheriff of Wyandotte county, Kansas, Swofford Brothers Dry Goods Company, the defendant herein, brought still another action in attachment in the common pleas court of Wyandotte county, Kansas, against Goldberg, and by its direction the sheriff of that county levied upon the same goods then in his hands. Constructive service by publication was then obtained in this last-mentioned case, and judgment taken, and the goods sold, and bought in by defendant. There was no appearance by Goldberg or Mrs. Rosencraz in any of the cases. Thereupon on January 23, 1896, plaintiff brought this her action against Swofford Brothers for conversion. The defendant in its answer pleaded: 1. A general denial; 2. An estoppel on the part of plaintiff, by reason of her agreement not to enforce her debt in preference to Goldberg's other creditors; 3. A lien for the amount of the freight paid by defendant; 4. That the transfer by Goldberg to plaintiff in New Mexico

was by the laws of that territory ⁵²⁷ a general assignment for creditors; 5. Want of capacity in plaintiff to maintain this suit; 6. Because the transfer of the goods by Goldberg to plaintiff was fraudulent and with intent to hinder and delay creditors.

The reply denied all new matter and again prayed judgment. Among other instructions plaintiff prayed the court for the following:

"9. The jury are instructed that if the plaintiff delivered the goods in controversy to the Atchison, Topeka and Santa Fe Railroad Company, to be transported to Chicago, Illinois, and while en route to Chicago the same were taken from said company under a writ of attachment, issued at the instance and served under the direction of defendant, and that said attachment suit was dismissed, and that the attorney for said railroad company assigned the lien of said railroad company on said goods for freight and made said assignment to one Roy, if the jury find that said Roy was acting for the said defendant in taking said assignment, and that the said defendant, in the name of said Roy, took possession of said goods at Kansas City, Missouri, then they must find for plaintiff, notwithstanding that said Swofford Brothers Dry Goods Company subsequently caused said goods to be attached.

"10. The jury are instructed that, if said Swofford Brothers attached the said goods at Kansas City, Missouri, and thereafter released their attachment and then sent said goods over into the state of Kansas, of which state the said Goldberg was a nonresident, for the purpose of having the same attached there, the courts of the state of Kansas acquired no jurisdiction over the said goods, and said attachments so issued in the state of Kansas are void, and the jury will entirely disregard them."

1. Prima facie, plaintiff was and is entitled to the possession of the goods which she shipped from Raton, New Mexico, to Chicago, or their value.

⁵²⁸ Whether bona fide, or with intent to hinder, defeat or delay creditors, the evidence unquestionably shows possession in Mrs. Rosencranz at Raton, New Mexico, and the receipt for her of the goods by the Santa Fe railroad to be transported to Chicago and to be redelivered there to her. By virtue of her possession she had the right to recover the goods or their value from every person except the right owner.

This has been the common law since the decision in *Armory v. Delamare*, 1 Strange, 505, wherein it was held that the finder of a jewel was entitled to bring trover against one who, having taken the jewel for examination, refused to return it.

In the language of Lord Campbell: "The law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is a title. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*, 2 Wm. Saunds 47b, and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers. It is not disputed that the *jus tertii* cannot be set up as a defense to an action of trespass for disturbing the possession. In this respect I see no difference between trespass and trover; for in truth the presumption of law is that the person who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrongdoer when he converted the goods? I am of opinion that this can not be done": *Jefferies v. Great Western Ry. Co.*, 5 El. & B., 85 Eng. Com. L. 802.

Judge Cooley in his work on Torts, second edition, page 520, marginal page 445, after reviewing various cases says: ~~520~~ "When, therefore, it is said that the plaintiff must have had, at the time of the conversation, the right to the property, and also a right of possession, nothing more can be intended than this: that the right of which he complains he has been deprived must have been either a right actually in possession, or a right immediately to take possession": *Cobbey on Replevin*, sec. 786; *Vanzant v. Hunter*, 1 Mo. 71; *Stowell v. Otis*, 71 N. Y. 36; *Knapp v. Winchester*, 11 Vt. 351; *Bartlett v. Hoyt*, 29 N. H. 317; *Guttner v. Pacific Steam etc. Co.*, 96 Fed. 619.

Plaintiff having possession of the goods, the law is that one who has wrongfully obtained the goods from her cannot defeat her action by showing title in another without connecting himself with the right of such person. How has defendant rebutted or attempted to show title out of plaintiff?

It is clear that neither by the attachment suit commenced in the circuit court of Johnson county, Kansas, nor by the

attachment sued out in the circuit court of Jackson county, Missouri, was the title of plaintiff in any manner affected, because neither was prosecuted to judgment. The only question, then, is as to the effect of defendant's judgment in the Wyandotte county common pleas court. This leads us to inquire what jurisdiction the common pleas court acquired over this property as between defendant and plaintiff. Plaintiff, being the shipper and consignee also of the goods, was *prima facie* the owner thereof, but defendant had the right to attach them if it could establish that the sale and transfer to plaintiff by Goldberg was fraudulent as against defendant, and when the action of defendant was commenced in Kansas City, Missouri, and the goods seized under the writ, the circuit court of Jackson county unquestionably acquired jurisdiction over them, but when defendant by means of attachment ⁵³⁰ had brought the goods within the jurisdiction of the circuit court of Jackson county, and then induced the sheriff of Jackson county to turn them over to its agent, it is absolutely clear it had no legal possession. The sheriff had no right to turn them over to defendant. He held them by virtue of a writ, and subject to the lawful orders and judgments of the circuit court of Jackson county, and not as defendant might direct. But as if to remove the last semblance of authority for holding the goods, defendant dismissed its attachment under and by virtue of which the possession was acquired from plaintiff's carrier, and thus prior to the removal of the goods to Kansas defendant was in possession of plaintiff's goods without the slightest justification in law. It was as to plaintiff a naked trespasser in possession by virtue of an abuse of the state's writ of attachment. Having obtained the possession and dismissed its writ it had neither title nor color of right to retain the possession, and if plaintiff had brought replevin or sued in conversion before the removal of the goods to Kansas and after the dismissal of the attachment suit brought in Jackson county, it is too plain for discussion that defendant would have had no defense whatever to the action. Whatever efficacy there might have been in the writ ceased when it was dismissed, and the officer who had levied it, instead of restoring the goods to the party from whom he took them, had turned it over to defendant who had no right to them. *Prima facie*, the officer himself having a writ directed against Goldberg alone which he levied on property in plaintiff's possession, was a trespasser: *State v. Hope*, 88 Mo. 435. And when at the instance of de-

fendant, he turned the goods over to defendant, the latter also was a trespasser. Conceding that defendant was a creditor of Goldberg, it would have had no right, merely because it was his creditor and that he was attempting to defraud it, to seize his property and hold it without any lawful process. How much less could it ⁵³¹ justify its seizure of property of which Goldberg had no possession and which was in the possession of plaintiff. As said in *Mississippi Mills v. Meyer & Co.*, 83 Tex. 438, 18 S. W. 749: "The fact that a naked trespasser is the creditor of the owner of the goods, or that the plaintiff's title may be founded in fraud, will not justify the trespass": *Hudson v. Willis*, 73 Tex. 258, 11 S. W. 273.

Such was the condition of affairs when defendant removed the property out of this state into Kansas in order that the Kansas writ of attachment could be levied upon it. As already said, it seems the Johnson county attachment was levied on the goods in Wyandotte county. For two reasons defendant cannot avail itself of that attachment by way of defense: 1. Because this attachment was, like the Missouri attachment, dismissed without having even gone to judgment and without service on Goldberg; 2. For the reason that defendant being in possession of the goods in Missouri purely and simply as a trespasser and having taken them into Kansas in order that the writ of attachment in that state could be levied on them, the levy conferred no jurisdiction, because it was a fraud in law, whatever the intention of defendant was, and this defendant cannot avail itself of its wrongful act to confer jurisdiction on the courts of Kansas, and then plead their process as a defense to plaintiff's action for their original and continuing trespass and wrongful conversion.

However honest and valid its claim against Goldberg, and this we do not for a moment question, no valid legal sequestration could follow its illegal act in thus taking the property out of this state and having it attached for its benefit in Kansas. The courts cannot and will not countenance such a method of acquiring jurisdiction and the plaintiff is not estopped to question the jurisdiction of a court of a foreign state obtained in such manner and by such means. But as we have said, the levy in the Johnson county case was abandoned and it constitutes ⁵³² no defense. This leaves but the Wyandotte attachment as a defense. This last attachment is pervaded with the same vice as that which preceded it. The

property was within the local jurisdiction of the Wyandotte common pleas court, solely and wholly as the result of the original trespass of defendant, and this subsequent attachment did not and could not purge it of the original wrong in unlawfully taking the goods out of this state into Kansas in order to confer a jurisdiction which that court otherwise would not have had over it. The proceeding was conducted at the instance of defendant, and we think that it is open to plaintiff's attack on it for the same reasons that must govern the Johnson county attachment. The stream cannot rise higher than its source: *Hoes v. New York etc. R. R. Co.*, 173 N. Y. 435, 66 N. E. 119.

It is apparent, then, if we are right in holding that the Kansas courts did not and could not acquire jurisdiction over plaintiff's goods in favor of defendant by illegally taking them out of this state into Kansas in order that defendant's attachment in that state might be levied upon them, defendant had no defense to plaintiff's action by reason of any attachment or judgment liens. Having no title in itself and no lien, can it be heard to justify its seizure and possession of plaintiff's goods by asserting or showing that the sale from Goldberg to plaintiff was fraudulent as to Goldberg's creditors, or in other words, in such case can defendant show title in a third person as a defense? We think the great weight of authority is that it cannot. *Cobbey on Replevin*, second edition, section 786, lays down the rule that: "A defendant who has wrongfully taken possession of the property cannot set up as a defense that other persons who are not defendants have a lien on the property which entitles them to its possession."

And it was held in *Mississippi Mills v. Meyer & Co.*, 83 Tex. 438, 18 S. W. 748, that "the fact that a naked trespasser is a creditor of the owner of the goods, or that the plaintiff's title may be founded in fraud, will not justify the ⁵³³ trespass." This was the rule announced by Lord Campbell in *Jefferies v. Great Western Ry. Co.*, 5 El. & B., 85 Eng. Com. L. 802; *Hudson v. Willis & Bro.*, 73 Tex. 256, 11 S. W. 273.

Defendant was in no position to avail itself of the fraud of Goldberg, if any, in attempting to defeat his creditors, as it had not acquired Goldberg's title in any lawful manner, but was a naked trespasser in the circumstances, and has not connected itself with Goldberg's possession or title in any lawful manner.

2. Was it open to defendant to avail itself of the lien of the Santa Fe Railway Company for its freight charges?

It is too clear for discussion that the assignment to Roy was for defendant's benefit. He was acting for defendant's counsel in taking the assignment, and it paid the money to procure the assignment, and this was only one other step in the general scheme to get the goods out of Missouri into Kansas. If the sheriff of Jackson county had paid the freight bill and the attachment in Missouri had been followed up to judgment and sale, it may be the sheriff would have been allowed this amount, but, as this was not done, it is obvious that it was his duty when the attachment in Jackson county, Missouri, was dismissed, to have returned the goods, either to plaintiff, or her bailee, the railroad company.

In 5 American and English Encyclopedia of Law, second edition, 420, it is said: "The lien of a railroad company for freight is neither property, nor a debt, but a mere right to have a debt satisfied out of certain specified property, and is a personal right which cannot be sold or assigned."

In *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271, the supreme court of Maine said: "It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not transferable, and that no question upon it can arise except between the principal and factor: *Daubigny v. Duval*, 5 Term Rep. 604; *McCombie v. Davies*, 7 East, 5; *Jones v. Sinclair*, ⁵³⁴ 2 N. H. 319, 9 Am. Dec. 75; *Holly v. Huggefurd*, 8 Pick. 73, 19 Am. Dec. 303; *Pearsons v. Tincker*, 36 Me. 384. No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common-law liens. . . . The object of these liens being the same, their effect must be the same."

In *Holly v. Huggefurd*, 8 Pick. 73, 19 Am. Dec. 303, Parker, C. J., said: "The lien of a factor does not dispossess the owner until the right is exerted by the factor. It continues only while the factor himself has the possession; and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien": *Lempriere v. Pasley*, 2 Term Rep. 485; *Everett v. Saltus*, 15 Wend. 478.

The lien of the Santa Fe Railway Company was no defense to plaintiff's right of action in this case. It ceased when the company assigned or attempted to assign it to defendant.

3. But the defendant invokes the doctrine of estoppel against the plaintiff. This it predicates on the statement of Goldberg to defendant when he bought the goods, August 24, 1895, to the effect that he was indebted to Rosencranz in the sum of two thousand one hundred dollars, but that Rosencranz was his brother in law, and that Rosencranz was willing to carry said indebtedness and not allow it to bother or interfere with his paying his other creditors, and subsequently in November, 1895, and after defendant had sold the goods to Goldberg defendant wrote to J. Rosencranz, advising him of Goldberg's statement to it, and received a letter from plaintiff in which she says, "replying to same, I will say that the statement made to you in August last by Herman Goldberg of Raton, N. M., regarding the indebtedness to me of two thousand one hundred dollars, was correct.

535 Plaintiff requested the court to instruct the jury that if Swofford Brothers Dry Goods Company sold no goods to Goldberg after receiving the letter from plaintiff, there was no binding agreement between plaintiff and Swofford Brothers Dry Goods Company not to enforce said indebtedness against the interests of said Swofford Brothers Dry Goods Company, which instruction the court refused, and plaintiff excepted. The court modified several similar instructions by adding thereto these words: "Unless you further believe there was between the plaintiff and said Goldberg an agreement, and that the same was communicated to the defendant by said Goldberg, that plaintiff would not allow his indebtedness to her to bother him or interfere in any way with his paying for goods purchased of wholesale houses, and that defendant relying on and induced by such agreement extended credit to Goldberg." To this modification plaintiff duly excepted at the time.

The question is, Was plaintiff by reason of this representation by Goldberg and her subsequent letter, estopped to purchase goods of Goldberg to save her debt? It is plain that defendant was notified that Rosencranz was a creditor of Goldberg to the amount of two thousand one hundred dollars. There was no concealment of this indebtedness. Without some valid contract binding her to other creditors not to enforce this debt, neither law nor justice would prevent the enforcement of this

debt any more than any other obligation owing by Goldberg. Advised of this indebtedness before it sold to Goldberg, defendant took no steps to obtain such an agreement in its favor. It sold him its goods and had no communication with Mrs. Rosencranz for more than two months afterward. It then wrote her and stated that Goldberg had assured it that she was willing to carry the indebtedness and not allow it to interfere with his paying his other creditors. Her debt was due. She had voluntarily agreed to indue her debtor, but there was, so far as this record discloses, no consideration for this ⁵³⁶ promise. As between her and Goldberg it would not have prevented her suing him at any time, and would have constituted no defense to her action. She had made no agreement with his creditors not to collect her debt or to give them a preference.

It may be that, if to induce defendant to sell him goods she had agreed her debt should be made subordinate to any debt he contracted with it for goods on the strength of her agreement, she might have been estopped to claim her rights along with it, but it is apparent it did not act on any such an understanding, but sold him goods without obtaining any agreement or having any understanding with her.

We are cited by defendant to *State Savings Bank v. Buck*, 123 Mo. 141, 27 S. W. 341; but that case is easily distinguished from this in that there the debt and the absolute deeds given to secure it were kept secret, and Buck and McCrosky permitted to obtain credit from others who extended credit in the faith of their ownership of the property. Here the debt was announced before the goods were sold. No mortgage or other lien had been taken which would give Mrs. Rosencranz any advantage over any other creditor.

All that was represented was by the debtor, and that was that she was willing to indulge him and not prevent his paying others he owed. The element of secrecy and the taking of a deed which might operate to give her a superior lien is wholly wanting.

Rice v. Bunce, 49 Mo. 231, 8 Am. Rep. 129, is also relied on, but in that case one having an equitable interest in land was present when it was put up for sale as the property of the person in whom the record showed title. He not only gave no notice of his title, but entered the list of bidders, and by his silence and acts, induced another to expend his money, whereas in this case Goldberg gave notice of the Rosencranz debt, and

Mrs. Rosencranz did no act to induce defendant to extend him credit on the assumption that she would not enforce it. At most she ⁵³⁷ was represented as a creditor who was willing to be indulgent and not to crowd Goldberg.

Conceding the full force of the doctrine of estoppel, that one who neglects to speak shall not be heard to do so when his silence or acts have led another to act to his injury, we are unable to find any evidence upon which to estop plaintiff in this case. Her debt was not kept secret. She made no representation to defendant to induce it to sell its goods to Goldberg, and conceding she was willing to indulge her debtor she was in no manner bound to forego the collection of her debt. The cases all agree that there can be no estoppel unless the party who alleges it relied upon the representation, was induced to act by it and thus relying and induced did take some action. Giving now full scope to everything represented by Goldberg, it must have been apparent to any reasonable man contemplating extending him credit, that if he desired to estop Mrs. Rosencranz something more than her mere gratuitous agreement with Goldberg was required to tie her hands so that she would not be at liberty to enforce her debt like his other creditors. Defendant was notified. It cannot be heard to say, in view of the evidence adduced by itself, that the truth was unknown to it at the time it sold Goldberg and at the time it credited him. Mrs. Rosencranz asserted the debt which defendant was advised she held, and it knew the full extent to which she was bound not to enforce it, and that was a gratuitous agreement founded upon no consideration. It sought no greater security before it sold to him and obtained no more later. We do not think defendant established its estoppel even if it had been in position to do so. But if it had any equities or could invoke estoppel in a proper case, it cannot do so here, for the reason that it stands in this record as a trespasser with no right or title to the property. It acquired no lien or title by its attachment proceedings in Kansas. Plaintiff was in the peaceable possession, and if it desired to rely on its estoppel ⁵³⁸ it should have proceeded, not by trespass or force, but by invoking its claim in a court of justice. This defense is no more open to it than was the claim that Goldberg had sold and delivered the property to plaintiff to defraud his creditors. So far as this action is affected these two defenses stand in the same class.

Whatever the "confusion" which defendant pleads as an extenuation of the methods resorted to for the purpose of giving the Kansas courts jurisdiction, it must be said that plaintiff in no way contributed to it.

While we are satisfied defendant was only attempting to secure an honest debt, and that there was no wicked purpose in the various steps taken by it, still the courts cannot countenance the extreme methods used in this case to confer jurisdiction on the Kansas courts over plaintiff's goods. However honest the debt, it can only be enforced in the courts by obtaining jurisdiction in the manner prescribed by the law of the land. The fact of jurisdiction may be inquired into and when obtained by fraud in fact or fraud in law, the judgment may be impeached collaterally.

This principle is well established in *Parsons v. Dickinson*, 11 Pick. 352; *Wood v. Wood*, 78 Ky. 624; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495; *Deyo v. Jennison*, 10 Allen, 410; *Drake on Attachment*, sec. 193; *Byler v. Jones*, 79 Mo. 263; *Capital Bank v. Knox*, 47 Mo. 333.

It results that the court erred in refusing plaintiff's instructions invoking the views we have expressed, and in giving those for defendant. The judgment is reversed and the cause remanded to be proceeded with in accordance with this opinion.

All concur.

The Conversion of Personal Property sufficient to sustain trover is the subject of a monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 795-819. And the title and possession sufficient to maintain trover are discussed in the note to *Hostler v. Skull*, 1 Am. Dec. 585-589. The general rule is, that in an action of trover the plaintiff must show that at the time of the conversion he had a right of property, general or special, in the chattels, and the possession or the immediate right to the possession thereof: *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888. His possession may be actual or constructive: *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *Lewis v. Mobley*, 4 Dev. & B. (N. C.) 323, 34 Am. Dec. 379. See, also, *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 360; *Alliance Trust Co. v. Nettleton Hardware Co.*, 74 Miss. 585, 60 Am. St. Rep. 531, 21 South. 596.

Upon the Dissolution of an Attachment, the defendant is entitled to the return of the property: *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

FARMERS' AND MERCHANTS' INSURANCE COMPANY
v. DABNEY.

[62 Neb. 213, 86 N. W. 1070.]

APPEAL.—Exceptions to the Exclusion of Testimony are unavailing, unless there is tender made of the proof which it was sought to elicit. (p. 626.)

PLEADING—New Cause of Action in the Reply.—An objection that cause of action is first stated in the reply is waived, if not raised in the trial court, and the issues are presented and submitted on their merits. (p. 628.)

APPEAL.—If the Proofs are Conflicting, the Verdict will not be disturbed on appeal, unless clearly not sustained by the evidence. (p. 629.)

APPEAL.—Alleged Error not Brought to the Attention of the trial court will not be considered in the supreme court on a review of the case by petition in error. (p. 630.)

CLASS LEGISLATION.—There is Nothing in the Constitution of the United States, or of Nebraska forbidding the classification of subjects for the purpose of legislation. (p. 630.)

CLASS LEGISLATION—Attorney's Fees Against Insurance Companies.—A statute authorizing the taxation of attorney's fees as costs when a judgment is rendered against an insurance company in an action on a policy covering real estate, is constitutional. (p. 631.)

Halleck F. Rose and Wellington H. England, for the plaintiff in error.

Michael F. Harrington, for the defendant in error.

214 DAY, C. For brevity the parties will be referred to as "plaintiff" and "defendant" as they appear in the court below.

This action was brought by plaintiff, on appeal from the county court to the district court of Holt county, against the defendant, the basis of the action being an insurance policy issued by the defendant to the plaintiff, dated April 26, 1892, and expiring April 26, 1897. The consideration for the policy was plaintiff's note ²¹⁵ for thirty-six dollars, dated April 26, 1892, and due December 1, 1892. The specific property covered by the policy and the amount of insurance thereon were as follows: eight hundred dollars upon the dwelling-house; three hundred dollars on barn No. 1; two hundred dollars on barn No. 2; and five hundred dollars on cattle. The dwelling-house was wholly destroyed by fire on March 14, 1896. The trial resulted in a verdict for plaintiff for eight hundred and thirty-seven dollars, upon which, with accrued interest, a judgment was subsequently rendered. To review this judgment defendant brings error to this court.

The answer admitted the issuance and delivery of the policy, but alleged that the note given for the premium contained a stipulation that the company should not be liable for any loss or damage which might occur to the property while the note, or any part thereof, was past due and unpaid; that at the time of the alleged fire the note was past due and unpaid, and still remains unpaid; that the policy by its terms became suspended and inoperative, and no liability attached to the defendant thereunder. The policy contained a stipulation as follows: "If a note be given for the premium on this policy, or any part thereof, it is mutually agreed and understood by and between the assured and the company that, in case said note or any part thereof be not paid at maturity, this policy shall be suspended, inoperative, and of no force and effect so long as such note, or any part thereof, remains overdue and unpaid; and in case of any loss of said property, either partial or total, while said note or any part thereof remains overdue and unpaid, this company shall not be liable for said loss, nor shall the payment of said note, or the receiving or retention of the proceeds, or any part thereof, by this company, render it liable for any loss occurring while said note, or any part thereof, remains overdue and unpaid; nor shall such payment or retention be said to be a waiver of any condition in the policy or obligation. The payment of the premium, however, revives this policy, and reinstates the same for the remainder of this term only."

²¹⁶ The reply alleged that, previous to the fire, it had been mutually agreed that the contract of insurance was severed; that

the dwelling-house was insured separately from the other property; that the defendant received from plaintiff full payment of the premium on the dwelling-house prior to the loss. By order of the court, the petition filed in the county court was to stand as the petition in the district court, to which defendant filed answer, and plaintiff filed reply.

It will not be necessary to consider all of the numerous errors alleged in the petition in error. Such as are not argued in the brief will be deemed to have been waived. One of the assignments relates to the overruling of the motion to strike the reply from the files.

Immediately after the jury was sworn, the defendant called the county judge as a witness, presumably to show by oral testimony that the issue presented by the pleadings was different from what it was in the county court. Upon objection to the examination of the witness on the ground that its purpose was not disclosed, defendant made an oral motion to strike the reply for the reason that the pleadings presented a new issue from the one tried in the county court; but before the motion was passed on, or any testimony taken in support thereof and apparently immediately following the motion to strike the reply, the defendant suggested a diminution of the record. A colloquy followed between the court and counsel, for both sides, at the conclusion of which the court made a ruling: "The order is granted, and I will look up the question of jeopardy." This is the only ruling disclosed by the record on the motion to strike the reply, and to this ruling no exception was taken by the defendant. The order of the court is indefinite as to its application to the motions then before the court, but it referred to the diminution of the record; otherwise, there would have been no occasion to have proceeded with the trial upon the theory the case was tried. It would have been an easy matter, by comparison of the pleadings in the county court with those in the district ²¹⁷ court, to determine whether a new issue had been raised. The record brought to this court shows the proceedings had in the county court, and discloses that plaintiff was granted leave to file a reply, and that a reply was filed; but it is not set out in the transcript. If it had become lost, its contents could have been established by competent evidence. If the defendant desired to insist on its motion to strike, it should have interrogated the witnesses further, and, if denied that right, made its offer to prove the fact. Failing to do this, there is nothing presented in this assignment of error for our review.

Assignment of error No. 4 is: "In permitting the trial of issues not raised in the trial in the county court, where the case originated." Nowhere in the record is it shown what the issues were in the county court; nor is it shown in what respect the issues tried in the district court were different from those that were tried by the county court. There is, therefore, nothing before us from which it can be determined whether the issues were the same or not. Defendant started to show the difference, if any, at the entrance of the trial, but did not persevere long enough to prove any difference. At the conclusion of the evidence, defendant made an offer "to show that the issues in the case and tried in this court are different and other issues from the issues in the court below." But the offer did not inform the court in what respect the issues differed, nor what the issues were in the court below, nor any facts from which such conclusion could be drawn. The offer was a mere conclusion. The facts should have been stated, so that the court could say from them whether a new issue was presented. From the record made, this court is unable to say that the offered testimony, if received, would have shown any difference. "Exceptions to the exclusion of testimony are unavailing, unless there be tender made of the proof of which it was sought to elicit": *Union Pacific Ry. Co. v. Vincent*, 58 Neb. 172, 78 N. W. 457; *Hambleton v. Fort*, 58 Neb. 282, 78 N. W. 498.

Defendant insists that on the pleadings and evidence it ²¹⁸ was entitled to a verdict as a matter of law. This contention rests in part upon the peculiar state of the pleadings. Plaintiff had stated one part of his cause of action in the petition and the remainder of it in the reply. The answer admitted a part of the petition, including some facts that were at variance with the reply. To illustrate: The petition charged that the consideration for the issuance of the policy was plaintiff's note for thirty-six dollars, and the property described as being covered by the policy was the dwelling-house only. The answer admitted this, but alleged the note had not been paid, and pleaded conditions of the note and policy which would suspend its operation. The reply alleged that the contract had subsequently been severed, and that the amount of premium on the dwelling-house for the full period had been paid, and that the balance due upon the note was for the premium upon the other items of property covered by the policy. With this confusion as a basis, defendant contends that the facts alleged in the petition, which were expressly admitted in the answer, became conclusively established for the

purpose of trial, and could not be avoided by a reply. As a general rule of pleading, we think this contention is correct; but, as applied to the procedure adopted by the defendant in this case, the claim is too broad. If the defendant had moved the court to strike the reply, or a part thereof, because the allegations therein were inconsistent with the material allegations of the petition, we think it would have been sustained; but where no objection is made on that ground in the district court, and the issues are presented and submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived: *Gregory v. Kaar*, 36 Neb. 533, 54 N. W. 859. The petition should contain a full statement of the facts constituting plaintiff's cause of action, and the facts should be stated so as to harmonize with the proof produced at the trial. It is no part of the office of a reply to contain allegations which are, necessarily, a part of the cause of action, and which must be sustained by plaintiff's proof in opening: ²¹⁹ *Wigton v. Smith*, 46 Neb. 461, 64 N. W. 1080; *Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854. Where the pleader has interchanged these offices, the defendant in the trial court must move at the proper time in the interest of better pleading, or he will be deemed to have waived the defect. He cannot go to trial, and, after verdict against him, be heard to object that the cause of action is stated in the reply: *Vernon v. Union Life Ins. Co.*, 58 Neb. 494, 78 N. W. 929.

The contention of defendant that it was entitled to a verdict on the pleadings and evidence is also supported by an exhaustive analysis of the evidence. There was a difference in the testimony given by the plaintiff and that given by the principal witness for the defendant concerning the severance of the policy and the application of payments. In many details they were in complete harmony, and both agreed that the company was to approve of the request of plaintiff before it would become operative, and the agent was to communicate from Lincoln, after submitting the question to the company. He did communicate in a letter (omitting formal parts), as follows: "Frank Dabney—Dear Sir: I inclose your policy. Everything O. K. Note extended to fall due same time as last one." The letter is so indefinite that it will sustain almost any contention based on the policy. Plaintiff testified that, when the payment of ten dollars was made, no instruction was given as to how it should be applied; that later, when the agent adjusted the loss on a steer which had been killed by lightning, the plaintiff wanted the

amount (seventeen dollars and eighty-six cents) applied on the note, so that the house would be insured anyhow; that the agent thought it would be all right to apply the payment that was already paid on the house; and that he would write when he got to Lincoln. He was then asked: "What did he say about insurance on the dwelling-house of eight hundred dollars? He said it would be all right. Well, explain how it would be all right? If it would be satisfactory to the company, and he thought it would, to apply the payment that was already ²²⁰ paid on the house, and he would write me when he got to Lincoln, and the seventeen dollars and eighty-six cents apply that on the note. The premium on the house was sixteen dollars. Now, what was to be done after you had paid the premium on the dwelling-house, the sixteen dollars and interest? What was to be done with the balance? It was to be applied on the rest of the insurance." The testimony of plaintiff tending to establish a severance of the contract, the conversations with the agent, and the letter, together with the testimony of the agent, that he reported to the company all that was said between plaintiff and himself, and that the letter was written in pursuance of the direction of the company, were all matters presenting an issue of fact, upon which there might be a difference of opinion, and in submitting the issue of a severance of the contract to the jury, we think the court acted wisely.

Defendant further urges that the clause in the policy suspending it while the premium note is past due is reasonable and just, and that nothing short of full payment or waiver of the stipulations can remove the suspension caused by the failure to pay the note. Granting this to be true, it cannot avail defendant; for the question was fairly submitted to the jury as to whether the contract had been severed and whether the full premium upon the dwelling had been paid. The jury resolved these questions in favor of the plaintiff.

Where the proofs before the jury are conflicting, the verdict will not be disturbed, unless clearly not sustained by the evidence: *Van Housen v. Broehl*, 59 Neb. 48, 80 N. W. 260; *Chicago, Milwaukee etc. Ry. Co. v. Johnston*, 58 Neb. 236, 78 N. W. 499; *Louis v. Union Pacific Ry. Co.*, 48 Neb. 151, 66 N. W. 1133. In our view, there was evidence sufficient to sustain the verdict.

Defendant also contends that the verdict was excessive, the full amount of insurance upon the house destroyed, when there was a small sum still due upon the note originally given for the

policy. This point might be well taken ²²¹ if a counterclaim had been filed for that amount. It did not do it, nor did it call the attention of the court to it at the trial nor in the motion for a new trial. It is presented in this court for the first time. It is the established rule of the court, in reviewing a case by petition in error, to refuse to consider an alleged error that was not brought to the attention of the trial court: *Ecklund v. Willis*, 42 Neb. 737, 60 N. W. 1026; *Clark v. Carey*, 41 Neb. 780, 60 N. W. 78; *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Broadwater v. Foxworthy*, 57 Neb. 406, 77 N. W. 1103.

The district court, on the day the motion for a new trial was overruled, entered an order finding there was due the plaintiff from the defendant a reasonable attorney's fee in the case, in the sum of one hundred and fifty dollars, and taxed this amount as part of the costs. This order was made under the authority of section 45, chapter 43, of the Compiled Statutes, which provided: "The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as attorney's fee, to be taxed as part of the costs." A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional, and, to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one in this state. The precise question has been decided by this court, and many of the authorities cited in the brief of defendant were considered and reviewed by the court. In *Insurance Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, Judge Sullivan, referring to the decisions of our own court says: "These decisions are vigorously attacked; but we are convinced, as a result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the constitution of the United States or of this state which forbids classification of subjects for the purpose of legislation: *Barbier v. Connelly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Atchison etc. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. Rep. 609; *State v.* ²²² *Farmers' & Merchants' Irr. Co.*, 59 Neb. 1, 80 N. W. 52. . . . The legislature we think within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorney's fees, because experience and observation had shown that the defenses upon which they generally rely are without merit, and contracted out of the forfeiture

clauses with which their policies are thronged. The law in question was designed to repress an evil practice, advance public interests, and promote justice. It was an exercise of legislative power, justified by considerations of public policy. Similar statutes have been held valid in other jurisdictions: *Kansas Pac. Ry. Co. v. Mower*, 16 Kan. 573; *Railroad Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602; *Peoria Decatur etc. Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Perkins v. St. Louis etc. Ry. Co.*, 103 Mo. 52, 15 S. W. 320; *Burlington, Cedar Rapids etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Cameron v. Chicago, Milwaukee etc. Ry. Co.*, 63 Minn. 384, 65 N. W. 652; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386. In numerous cases this court has sustained an allowance for attorney's fee as part of the costs under this statute: *Insurance Co. of N. A. v. Bachelor*, 44 Neb. 549, 62 N. W. 911; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068; *Hartford Fire Ins. Co. v. Corey*, 58 Neb. 209, 73 N. W. 674; *German Ins. Co. v. Eddy*, 37 Neb. 461, 55 N. W. 1073; *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655, 71 N. W. 290; *Home Fire Ins. Co. v. Weed*, 55 Neb. 146, 7 N. W. 539.

It is therefore recommended that the judgment be affirmed.

Hastings and Kirkpatrick, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Supreme Court of the United States, on writ of error, affirmed the decision of the Nebraska court in the principal case: See *Farmers' & Merchants' Ins. Co. v. Dabney*, 189 U. S. 301, 23 Sup. Ct. Rep. 565. Justice White delivered the opinion of the court as follows:

"Having been adjudged to pay the amount of a fire policy written on the dwelling-house of the defendant in error, which was totally destroyed by fire, the plaintiff in error prosecutes this writ. The judgment was for eight hundred and sixty-one dollars and forty cents with interest, costs, and one hundred and fifty dollars as a reasonable attorney's fee. This latter amount was fixed under authority conferred on the court by sections 43, 44 and 45 of chapter 43 of the Compiled Statutes of Nebraska, which are a reproduction of chapter 48 of the Laws of Nebraska for 1899. The allowance of the attorney's fee is the basis of the federal right asserted. It is moved to

dismiss the writ on the ground that the federal right was not specially set up below as required by Revised Statutes, section 709 (U. S. Comp. Stats. 1901, p. 575), or was, in any event, alleged too late to enable the supreme court of Nebraska to consider it. Among the assignments of error contained in the petition in error filed before the hearing in the supreme court of Nebraska was the following: "Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney fee to be taxed, is unconstitutional and void for want of mutuality of the provisions, and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the fourteenth amendment to the constitution of the United States, and in conflict with section 3 of article 1 and section 15 of article 3 of the constitution of Nebraska."

"The case was considered by commissioners appointed pursuant to the Nebraska law to aid the supreme court of the state in the discharge of its duties. The commission in an elaborate opinion recommended the affirmance of the judgment. In such opinion the assignment of error concerning the attorney's fee, above quoted, was considered and numerous cases decided by the supreme court of Nebraska sustaining its allowance under the statute in question were referred to. It was said in the opinion that the legality of the attorney's fee 'was not an open question in this state,' because the right to allow the fee had been previously sustained by the supreme court of the state in many cases. A passage from the case of *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, expressly declaring that the statute concerning the allowance of the attorney's fee was consistent both with the constitution of the United States and of the state of Nebraska, was approvingly cited the passage in question being as follows:

"These decisions were vigorously attacked, but we are convinced, as a result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the constitution of the United States or of this state which forbids classification of subjects for the purpose of legislation."

"The supreme court of Nebraska for the reasons stated in the report of the commission, affirmed the judgment. It results that not only was the federal question relied upon specially called to the attention of the supreme court of the state of Nebraska, but it was by that court expressly decided. The grounds upon which the motion to dismiss is predicated are, therefore, without merit, and it is overruled.

"All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment are embraced

in the following propositions: 1. Because it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; 2. Because, whilst the obligation to pay attorneys' fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and 3. Because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court: *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. Rep. 535; *Fidelity Mut. Life Assn. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. Rep. 662. In the *Orient* case, a statute of the state of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren* case a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance companies. In the *Mettler* case a statute of the state of Texas was sustained, applicable, alone, to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of twelve per cent damages after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts or to authorize a classification of insurance contracts so as to subject one character of such contracts when put in one class to one rule and other varieties of such contracts when placed in another class to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss:

This, it is elaborately argued, takes this case out of the rule established by the previous cases, and causes the statute to be repugnant to the fourteenth amendment. But as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification.

“It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney’s fee in case of a total loss of real estate insured, and not permit recovery of such fee when the property insured has been only partially destroyed? The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the state. If, in regulating and classifying insurance contracts, the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason.

“Affirmed.”

Justices Harlan, Brewer, and Brown dissented.

The Constitutionality of Statutes allowing attorney’s fees is discussed in the monographic note to *Dell v. Marvin*, 79 Am. St. Rep. 178-186; *Sanitary Dist. v. Ray*, 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048; *Missouri etc. Ry. Co. v. Simonson*, 64 Kan. 802, 91 Am. St. Rep. 248, 68 Pac. 653; *Matter of Chapman v. New York*, 168 N. Y. 80, 85 Am. St. Rep. 661, 61 N. E. 108.

HARRIS v. JENNINGS.

[64 Neb. 80, 89 N. W. 625.]

NUNC PRO TUNC ORDER—Evidence on Which to Enter.—In entering an order nunc pro tunc, the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed on any satisfactory evidence. (p. 635.)

NEW TRIAL—Failure to File Motion for in Time.—A motion for a new trial must be filed within the time prescribed by statute, and if it is overruled because not filed within that time, all matters included therein are unavailing on review by proceedings in error. (p. 636.)

George B. Chaney, for the plaintiff in error.

J. M. Chaffin, for the defendant in error.

⁸⁰ **HOLCOMB, J.** By these proceedings, plaintiff in error, plaintiff below, prosecutes error from an order or ruling of the district court sustaining a motion for nunc pro tunc order. The ruling complained of is evidenced by the following entry on the journals of the trial court, as certified by the clerk: "Now, on this eleventh day of April, A. D. 1899, this cause coming on to be heard nunc pro tunc order granted on motion, showing injunction dissolved as of May 10, 1898, to which ruling of the court the plaintiff excepts," etc. To the writer it appears doubtful whether the entry ⁸¹ quoted constitutes a valid final order, to reverse which proceedings in error will lie. It is more in the nature of a recital to the effect that the court granted the defendant's motion, and is in itself insufficient and lacking in the formal requisites to show that the court ordered and directed that its journals should be corrected so as to show an order of dissolution of the temporary injunction as of the time stated, and as a nunc pro tunc order. However, we pass this, treating the order as a valid and final one, from which error may be prosecuted. It is argued that the evidence is insufficient to sustain the order, and that there existed on the journals and records of the court no written memorandum, or other entry of any kind or character, as evidence that the court had at the time stated, or at any other time, ruled on the motion to dissolve the injunction, or had made an order of the kind sought to have evidenced by the correction of the journal asked for. The evidence in support of the motion was quite positive that the court had by a prior order, and at the time mentioned, dissolved the temporary injunction allowed in the case, and fixed the amount of a supersedeas bond to hold the injunction in force until a trial on the merits could be had at the sum of one hundred dollars. The

evidence was presented in the form of affidavits by the parties to the action and their attorney. There was no evidence of the order having been made from any minute or other writing appearing on the journals, records, or dockets of the court, and it must be conceded that such evidence would be far more satisfactory, and is regarded as a better class of evidence; and in some jurisdictions it is held that such evidence is essential to sustain a nunc pro tunc order. After speaking to the same point in another case, it is said in *Ackerman v. Ackerman*, 61 Neb. 72, 84 N. W. 599: "This court, however, has adopted the rule, which seems the better one, that in the exercise of the power of correction of its records the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed upon any satisfactory evidence": Citing *School Dist. v. Bishop*, 46 ⁸² Neb. 850, 65 N. W. 902, and cases there cited; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. Rep. 487; *Jacks v. Adamson*, 56 Ohio St. 397, 60 Am. St. Rep. 749, 47 N. E. 48; 17 Ency. of Pl. & Pr. 931, note 2. The evidence in the case at bar, under the rule stated, was sufficient to sustain the finding and order of the trial court, and we cannot rightfully disturb it on that account.

Another insurmountable obstacle presents itself: No motion was made for a new trial within the time provided by statute, and consequently the trial court was right in overruling the motion, as it did, on the ground that the motion was not filed within the time and during the term at which the order complained of was made. The term of court at which the order was entered adjourned sine die on April 11th. The motion for a new trial was not filed until April 13th, and after the adjournment of the term. This neglect is fatal as to any question required to be presented to the trial court by motion for a new trial before a reviewing court is authorized to pass upon such question. The motion not being presented within the time provided by statute, the court was without authority to grant it, and could either have stricken it from the files or overruled it: *Nelson v. Farmland Security Co.*, 58 Neb. 604, 79 N. W. 161, and cases there cited. All matters included in the motion are therefore of no avail to the plaintiff in error, and we need not examine the evidence in support of the motion, or of the proceedings had during the trial, some of which were assigned in the motion as ground for a new trial, and on which error is now sought to be predicated. We find nothing in the record calling for a reversal of the ruling of which complaint is made.

For the reasons-stated, the order of the trial court is affirmed.

The Evidence upon Which an Order Nunc pro Tunc may be entered. is discussed in the monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 831-833. In some jurisdictions the court may resort to all sources of information that are competent under the general rules of evidence, including the parol testimony of witnesses: *Jacks v. Adamson*, 56 Ohio St. 397, 60 Am. St. Rep. 749, 47 N. E. 48; *Gonzales v. State*, 35 Tex. Cr. Rep. 339, 60 Am. St. Rep. 51, 33 S. W. 363. In other jurisdictions, however, a judgment nunc pro tunc cannot be entered upon parol evidence alone: *Young v. Young*, 165 Mo. 624, 88 Am. St. Rep. 440, 65 S. W. 1016. In Missouri the entry can be made only upon evidence furnished by the papers and files in the cause, or something of record, or in the minute-book or judge's docket: *Missouri etc. Ry. Co. v. Holschlag*, 144 Mo. 253, 66 Am. St. Rep. 417, 45 S. W. 1101. The clerk's minutes may be resorted to: *Knefel v. People*, 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388; and the judge's minutes are sufficient to authorize an entry: *Metzger v. Morley*, 197 Ill. 208, 90 Am. St. Rep. 158, 64 N. E. 280.

KITCHEN v. CHAPIN.

[64 Neb. 144, 89 N. W. 632.]

MARRIED WOMAN'S Guaranty of Payment of Note.—If a married woman assigns a note which is payable to her order, and guarantees its payment, she is liable on her guaranty, and the purchaser need not inquire as to her intended disposition of the proceeds of the sale. (p. 642.)

John P. Maule and Morning Brothers, for the plaintiffs in error.

John S. Kirkpatrick, for the defendant in error.

144 DUFFIE, C. William G. Chapin brought this action in the district court of Lancaster county against Mary C. Kitchen and A. D. Kitchen, alleging as his cause of action that he was the owner of a promissory note for five hundred dollars, made by James H. O'Neill, and payable to the order of Mary C. Kitchen; that after the execution and delivery of said note, and before the maturity thereof, the said Mary C. Kitchen sold, assigned and delivered the note to him, and for that purpose the said Mary C. Kitchen and A. D. Kitchen indorsed on the back of said note the following:

"For value received, I hereby assign the within note unto William G. Chapin, and hereby guarantee payment of the same and waive demand and notice of protest on same when due.

"MARY C. KITCHEN.

"A. D. KITCHEN."

It is alleged that the note is due and unpaid, and judgment is asked against the defendants. Mary C. Kitchen filed the following answer: "Now comes Mary C. Kitchen, and for her answer to the petition of the plaintiff says at ¹⁴⁵ the time the note sued on was executed and the indorsements of assignment and guaranty made, she was a married woman, the wife of her co-defendant, A. D. Kitchen, and living with him; that previous to this time she owned some city lots in Lincoln of uncertain value. Her said husband was engaged in the erection of some brick buildings in said city and was needing money. This defendant said to him if he could sell some of her lots she would make a deed to the purchaser, and he, her said husband, could have the money realized from said sales to use in the erection of the said buildings he was erecting. Later he represented to her that he had negotiated a sale for certain lots, and asked her to execute a deed to the same to the defendants O'Neill, which she did. Later he brought to her the note and mortgage in suit and asked her to write her name on the back of it, so he could use it in his business, which she did. The defendant alleges that she had no business dealings with the plaintiff whatever, that she had never been engaged in any trade or business, and did not get or receive any benefit or consideration for the sale of said lots or for the execution of the deed she executed thereto or for the transfer of said note to the plaintiff or for said assignment and guaranty. She alleges that she did not enter into said contract of guaranty for the purpose of binding her separate estate with reference thereto, but only for the purpose of passing the title of said note so her husband could get money to use in his own business and enterprises. Wherefore, she prays that she may go hence without day and recover her costs." The reply is a practical admission of all the facts set out in the answer, except that she did not indorse the note for the purpose of binding her separate estate, or with reference thereto. The case was tried to the court without a jury, and judgment entered for the plaintiff below, and Mrs. Kitchen has taken error to this court.

The only question presented by the record is whether the plaintiff in error, a married woman, is liable upon her guaranty, under the admitted facts in this case. In order ¹⁴⁶ to assist her husband in some building operation in which he was engaged, she sold certain lots which she owned in her own right, taking this note as a part of the purchase price. For the purpose of negotiating the note and obtaining money thereon for her hus-

land's use, she guaranteed payment of the note, in the form above shown. Was this a contract relating to her separate estate, and did she intend thereby to bind her separate estate? In *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, Judge Norval, in speaking of the liabilities of a married woman under our enabling act, remarks (page 578, 53 Neb., and page 83, 74 N. W.): "But this statute does not expressly nor by implication, enlarge a wife's capacity to contract generally. She can buy and sell property in her own name, and upon her own account, and enter into valid contracts with reference to her separate estate the same as if she were a feme sole, or as a married man may in relation to his property." It is undisputed that the note in suit was taken by Mrs. Kitchen on a sale of her separate property, and that the note itself was her separate property. She had the same right to hold and collect it or sell and negotiate it that a married man would have, and in the sale and transfer of the note she could undoubtedly bind herself by any contract of indorsement or guaranty that is usual or customary in the sale and transfer of such instruments. The contract was one relating wholly to her separate estate, in relation to which the statute empowers her to contract with the same freedom and to the same extent as though she were unmarried. The fact that the proceeds of the sale of the note were to go into her husband's business would not in the least affect her power to guarantee the payment of the note, and to bind herself by such guaranty. The third finding of the court is as follows: "That before the purchase of said note by the plaintiff, Mary C. Kitchen had given said note to the defendant A. D. Kitchen, to be used by him in his business, but that before said purchase said Mary C. Kitchen signed the guaranty hereinbefore found, and authorized her husband to put said note in circulation with ¹⁴⁷ said guaranty thereon." It is insisted that this finding shows that Mrs. Kitchen had parted with all interest in the note, and had given the same to her husband prior to indorsing the same, and that she is therefore no more liable upon her indorsement than she would be by indorsing the note of her husband or of some third party. This third finding of the court is inconsistent with the admitted facts, and we think it is not to be considered. It is undoubtedly true that Mrs. Kitchen agreed with her husband, prior to a sale of this note to the defendant in error, that he might sell some of her lots and use the proceeds in his business. As before stated, the note in question was taken as part consideration on the sale of some of her lots; and, in the sense that

she had agreed with her husband to give him the proceeds of these lots, she had given him this note. The record and her own answer make it plain, however, that she never transferred to her husband the legal title to the note by indorsing the same to him; and her answer admits that she indorsed the note at the request of her husband in order that it might be sold and the proceeds used in his business. We think that she is bound by the allegations of her answer, and that, fairly construed, admits that she indorsed the note in its present form for the sole purpose of negotiating the same and transferring the title.

Our attention has been called to some cases from other states, and particular attention directed to *Russel v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444. It appears from the statement of facts made by Judge Cooley in that case that Mrs. Russel, a married woman, was the owner of a note made to her by the Hamtramck Iron Works. She was also a stockholder in the Detroit Car Works. The latter company was indebted to the People's Savings Bank, which threatened suit for the collection of its claim. To prevent suit, Mrs. Russel indorsed the note given her by the Hamtramck Iron Works, and gave it to the bank as collateral security for the debt due it from the car company. The note not being paid at maturity, the bank brought suit ¹⁴⁸ against Mrs. Russel upon her indorsement. Judgment went against her in the superior court, which was reversed in the supreme court upon the ground that her contract of indorsement was made for the benefit of the bank, and that she could not bind herself as surety for another. The statement of the case shows that she indorsed this note, not for any purpose of her own, but as security for the payment of a debt due the bank from the car company, and the fact that she was a stockholder in the company could not enlarge her liability on the contract. Judge Cooley disposes of such a claim in the following apt words: "But it is said that in this case the suretyship was for the benefit of a corporation in which Mrs. Russel was a stockholder, and therefore she must be supposed to have had in view in making it her own interest in the corporation. Mrs. Russel however, was not identified with the corporation otherwise than as having an interest in it; the legal identity of each was distinct, and contracts for the benefit of the corporate estate were in no sense contracts for the benefit of the estate of one of its corporators. . . . The test of competency to make the contract is to be found in this: that it does or does not deal with the woman's individual estate; possible incidental benefits cannot

support it. Tested by this criterion this contract of indorsement, so far as it involves a personal responsibility, must fail. Mrs. Russel has contracted for the advantage, not of her own estate, but of a corporation with which she is no more identified in law than she is with her husband or any third person. . . . But there is no occasion to indulge in presumptions, one way or the other; it is sufficient that the contract is one of suretyship merely, and as such is not one the statute empowers a married woman to make." In the case we are now considering, the note was made payable to Mrs. Kitchen. She offered it on the market with her indorsement in the form above set out; and, while the purchaser of negotiable paper takes it with constructive notice of the disability of the maker or the indorser, we do not think that he is driven to the inquiry of the use to which ¹⁴⁹ a married woman intends to devote the proceeds of a note payable to her order, and which she indorses to give it currency. Concededly, the law is that she would be liable on this contract of indorsement, had she vested the proceeds of the sale in the improvement of her separate estate or to her own personal use; and we cannot bring ourselves to think that because she may invest it in presents made to her friends, or turns it over to her husband to be used by him in his business, that her liability is lessened in the slightest degree. A married woman in this state may engage in trade. Of necessity, she may take notes and bills in the conduct of her business, and having taken them, she may dispose of them like other traders. As a trader, she gives an implied warranty of her title to every article which she sells; and, in case the property is lost to the purchaser because she had no title when she sold to him, there can be no doubt of his right to maintain an action against her on her implied warranty of title. This being so, why can she not make an express warranty of the quality of the goods she offers for sale—a warranty that is valid and may be enforced against her? If she has not that power, then the statute which gives her leave to engage in trade places her at a disadvantage with other traders, who can make a valid warranty upon which their customers may rely as affording them protection. So, too, in the disposal of the notes and bills taken in the conduct of her business, if she cannot sell and dispose of them when the necessities of her business demand ready money, and make an indorsement upon which she may be held liable personally—if she can indorse, so as to transfer the legal title only—then she is again at a disadvantage, and may be com-

pelled to dispose of the notes and bills taken in the course of her business at a large discount, to a purchaser who would be willing to pay their full face value, if he could rely upon her indorsement, rather than on the solvency of the maker, who is perhaps unknown to him. These considerations lead us to believe that it was the intent of the legislature to give to a married woman the same rights ¹⁵⁰ as a married man possesses, and to impose on her the same liabilities in all transactions connected with her separate estate or trade or business, and that a person dealing with her in relation to her separate property need make no inquiry as to her intention in the disposition of the proceeds realized by her from a sale made either of notes or bills or of other property held by her in her own right.

We recommend the affirmance of the judgment.

Ames and Albert, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

As to a Married Woman's liability on her contract of suretyship, see Tompkins v. Triplett, 110 Ky. 824, 96 Am. St. Rep. 472, 62 S. W. 1021; Rogers v. Shewmaker, 27 Ind. App. 631, 87 Am. St. Rep. 274, 60 N. E. 462. A married woman and her separate estate are bound by her indorsement of a promissory note to a third person where the note purports to be payable to her order, though it was given for a pre-existing debt of her husband, if it was made pursuant to an agreement between the indorsee and the husband that if the note should be paid it should be in settlement of all claims between the parties: Robertson v. Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466, and see the cases cited in the cross-reference note thereto.

ALDRICH v. BANK OF OHIOWA.

[64 Neb. 276, 89 N. W. 772.]

JUDICIAL SALE.—Growing Crops do not Pass to the purchaser of the land at judicial sale so as to defeat the rights of one holding a chattel mortgage on them. (p. 644.)

Charles H. and F. W. Sloan, for the plaintiff in error.

C. A. Fowler, for the defendant in error.

276 OLDHAM, C. One Nierstheimer owned a farm in Thayer county, Nebraska, of one hundred and sixty acres, upon which George E. Aldrich, the plaintiff in error, had a mortgage. This mortgage was foreclosed by a decree of the district court for Thayer county, in 1897, at the February term thereof. The statutory stay was taken. Nierstheimer, the mortgagor, was in possession of, and was farming, this land and **277** in the month of September of the year 1897 he planted forty acres of this land to wheat. On November 15, 1897, he gave to the Bank of Ohiowa, the defendant in error, a chattel mortgage on the north one-half of this field of wheat, to secure his note, which he had that day given it for eight hundred and fifty dollars. This note was by its terms due in ninety days from its date. This mortgage was duly filed for record, and it is stipulated in the record that this note has not been paid. The land was sold under the decree of foreclosure by the sheriff of Thayer county on January 24, 1898, Aldrich being the purchaser. The sale was confirmed and a deed thereon was issued to Aldrich on March 21, 1898, and Aldrich at once took possession of this land and still has the possession. The bank claimed the right to go upon this land and harvest this mortgaged wheat, and demanded of Aldrich that it be permitted to do so. This was refused by Aldrich, who claimed the wheat by reason of his ownership of the land, and harvested and marketed the same; whereupon the bank brought its action against Aldrich for the conversion of the wheat. This action was tried to the district court of Thayer county (a jury being waived), which resulted in a judgment for the bank for the sum of one hundred and thirty dollars and seventy-six cents, the value of the wheat, less the cost of harvesting and marketing, from which judgment Aldrich prosecutes error to this court.

The problem for solution, then, is, Who was entitled to this wheat—the mortgagee or the purchaser of the land at judicial

sale? There is no question presented as to the validity of this chattel mortgage in its inception. The property was in esse, and the right to mortgage is not questioned; but it is claimed that by the confirmation of the sale the title to the real estate on which the wheat was growing passed to Aldrich and carried with it the wheat. So the ownership of this property is dependent on the question, Do crops that are not matured, but growing, on the land at the time of the confirmation of the judicial sale, pass to the purchaser of the land, or do they remain the property of him who planted them? Phases of this ²⁷⁸ question have been passed upon by this court. In *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, this court held: "A matured crop of corn standing ungathered upon land sold at a judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor who had planted and cultivated it." In *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32, the court say: "A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree and the sale confirmed while the crop was growing and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind. Held, that as between the tenant and purchaser the former was entitled to the crop." In this last case the court did not determine what the rights of the parties would have been had Monday secured possession and evicted O'Neil before the crop matured. But the court in both *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, and *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32, bases its decision on the case of *Cassilly v. Rhodes*, 12 Ohio, 88, and *Houts v. Showalter*, 10 Ohio St. 125. The doctrine of these cases is that annual crops growing on the land do not pass to the purchaser on judicial sale, because in law they are regarded as personalty. We must either accept this classification or reject the doctrine of the Ohio cases absolutely. To reject this would be to overturn *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, and *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32, which, to the extent they have gone in the application of this doctrine, have become a rule of property in this state; and for this reason we do not feel justified in overthrow-

ing them. This being so, nothing but the other alternative is left to us, which is the acceptance of this classification, and with the Ohio cases hold that the title to the annual crops growing on the lands does not pass to the purchaser on judicial sale, for the reason that the law regards them ²⁷⁹ as personal property. This being their legal status, the controversy over whether or not they were taken into account by the appraisers becomes immaterial. The appraisers of the land would have no right to appraise the personalty which they may find upon the land. This status of the property also renders the question of possession by the purchaser a plain and reasonable one. It will be conceded that a purchase of real estate would not carry with it the personal property of the vendor. When you buy and receive title to my land, you do not buy my horse, and by the act of buying the land you have acquired no right to the horse. The result would be, and is, the logical sequence of all personal property of whatsoever nature and kind, and hence Aldrich acquired no ownership of this property in controversy by reason of his purchase at judicial sale of the land on which the wheat was growing. Having no ownership, how would the possession of the land give him the right to treat this property as his own and apply it to his own use? Counsel suggest no answer to this question. Nor do we think it could be answered to his advantage. The land passes by a judicial sale to the purchaser, burdened with any and all the rights of other parties, including the mortgagor, that are not inconsistent with, or opposed to, title. Title, and this alone, is all the court gives the purchaser. From this he may, or may not, according to the circumstances of the case, or the rights of others, have the right of possession. But the possession of the purchaser could not, by any reason of that act, destroy the rights of others, nor justify him in appropriating other people's property; and it would make no difference to whom it belonged, as it did not belong to him.

The law recognizes the necessity of agriculture and favors its promotion, and, as is said in *Houts v. Showalter*, 10 Ohio St. 125: "Under our system, frequent advertisements and offers for sale, and occasionally revaluations are necessary, before a sale can be effected. When an appraisement is made it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public ²⁸⁰ interest, that the land should thenceforth lie waste; then, there may have been no crop sown or planted." This failure to sow or plant is what the law discourages, and it can only encourage sowing and planting un-

der circumstances like these by assuring a man that if he sow, he shall reap.

The judgment of the court below is right, and we recommend that it be affirmed.

Barnes and Pound, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Crop of Grain standing on mortgaged land at the time of its sale under a decree of foreclosure has been held to belong to the purchaser, notwithstanding a previous chattel mortgage on the crop: *Jones v. Adams*, 37 Or. 476, 82 Am. St. Rep. 766, 59 Pac. 811, 62 Pac. 16. See, also, *Reily v. Carter*, 75 Miss. 798, 23 South. 435, 65 Am. St. Rep. 621, and cases cited in the cross-reference note thereto; *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026; *Aultman & Taylor Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; note to *Crews v. Pendleton*, 19 Am. Dec. 752-755.

FELINO v. NEWCOMB LUMBER COMPANY.

[64 Neb. 335, 89 N. W. 755.]

MORTGAGE—Title and Possession of Mortgagee.—A provision in a mortgage that the mortgagee, upon default, shall be entitled to the immediate possession of the premises is valid, and subsequent purchasers and encumbrancers are chargeable with notice thereof. (p. 648.)

MORTGAGEE in Possession—Rents and Profits.—A subsequent purchaser or encumbrancer cannot maintain an action for the rents and profits against a mortgagee who has taken possession of the premises in accordance with the terms of the mortgage; while he will be required to account for the rents and profits, such account should be taken in the suit to foreclose or redeem. (p. 649.)

MORTGAGE FORECLOSURE Concludes Rights to Rents and Profits.—The foreclosure of a mortgage, by the terms of which the mortgagee, upon default, took possession of the premises, concludes the parties to the proceedings as to the rents and profits. (p. 649.)

Weaver & Giller, for the plaintiff in error.

Baldrige & De Bord, for the defendant in error.

335 ALBERT, C. On the first day of August, 1891, Alva A. Richardson and his wife executed and delivered to Luigui Felino a mortgage on certain real estate in South Omaha, to secure the payment of their note, executed to the same party, for two thousand dollars, with interest at seven per cent per an-

num, payable ³³⁶ semi-annually, according to the tenor of ten interest coupons for seventy dollars each, attached thereto. The mortgage was duly filed and recorded on the fifth day of August, 1891. In addition to the conveyances and agreements usually found in a mortgage, the mortgage contained the following clause: "And upon forfeiture of this mortgage, or in case of default in any of the payments herein provided the said Luigui Felino shall be entitled to the immediate possession of said premises." On the fifteenth day of August, 1891, the K. S. Newcomb Lumber Company sold and delivered to the said mortgagors certain material for the erection of a building on the mortgaged premises, and on the twenty-fourth day of December thereafter filed a lien therefor against said premises. On the thirtieth day of October, 1893, the said lumber company filed its petition in the district court against said mortgagors, and others, praying for the foreclosure of its said lien. The mortgagee, above mentioned, was not made a party to the suit. On the twenty-ninth day of December, 1894, a decree was rendered in said suit in favor of the lumber company, and on the first day of October, 1895, the premises were sold in pursuance of said decree to the said lumber company, and, in pursuance of an order confirming the same, on the twenty-sixth day of October, 1859, a deed issued to said purchaser. On the twenty-first day of September, 1895, Felino, the mortgagee, commenced an action for the foreclosure of his mortgage, making the said lumber company a party defendant, which action was prosecuted to a decree on the twenty-sixth day of May, 1896. In pursuance of this decree, in October, 1896, the premises were sold to Felino, the mortgagee, who on the thirty-first day of October, thereafter, received a sheriff's deed therefor. On the second day of October, 1895, and after the commencement of his suit to foreclose the mortgage, the mortgagors, having made default, surrendered possession of the premises to the mortgagee. On the 26th day of October, 1895, and after having received its deed to said premises, the lumber company demanded possession of the premises from the mortgagee, who was then in possession, which was refused. ³³⁷ On the twenty-first day of May, 1898, the lumber company commenced the present action against Felino to recover the rents and profits of said premises subsequent to the time it received its deed from the sheriff, issued in pursuance of the decree of foreclosure of its said lien. A trial was had to the court, which resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The theory of the plaintiff in the court below, and the only theory on which the judgment of the district court can be upheld, is that the mortgagor of real property retains the legal title and the right of possession until confirmation of a sale under a decree of foreclosure of the mortgage, and that such right of possession carries with it the right to the rents and profits of the mortgaged premises, and that as the plaintiff, by virtue of the sale in pursuance of the decree foreclosing its lien, acquired all the right, title and interest of the owner of the fee in and to the premises in controversy, it thereby acquired their right of possession, and, consequently, their right to the rents and profits accruing subsequently to the issuance of such deed and prior to the sale to the defendant in this case in pursuance of the decree foreclosing his mortgage. In our opinion, this theory is unsound. In the absence of any statutory regulation, the mortgagee is entitled to the possession of the premises: Jones on Mortgages, sec. 667. The only statutory regulation on the subject in this state is that to be found in section 55, chapter 73 of the Compiled Statutes, which is as follows: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case, the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. Of this provision subsequent ³²⁸ purchasers and encumbrancers, including the plaintiff in this case, were as fully charged with notice as with any other provision of the mortgage. In California it is provided by statute that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage. Under this provision it was held that if the mortgagee, after condition broken, takes possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits and apply them to the debts secured, and that he is to hold possession until the debt is paid: Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Frink v. Le Roy, 49 Cal. 314. These cases, while not directly in point, clearly recognize the right of the mortgagee to the possession of the premises under a stipulation like the one under consideration. In McIntyre v. Whit-

field, 13 Smedes & M. (Miss.) 88, it was held that a stipulation similar to the one contained in defendant's mortgage might be enforced by the mortgagees taking possession and holding it. That the mortgagee in possession would be required to account for the rents and profits, will be conceded, but such account should be taken in the suit to foreclose or in a suit to redeem. The defendant in this case, as we have seen, brought his action to foreclose his mortgage. All the parties, including the plaintiff in this case, were before the court in that suit. Every question involving the amount due on the defendant's mortgage, including the rents and profits received by him, were in issue in that case. The proceedings in that case are conclusive and binding, as to such questions, on all of the parties thereto. It follows that the judgment of the district court in this case is erroneous, and it is recommended that it be reversed, and the cause remanded for further proceedings according to law.

Duffie and Ames, CC., concur.

By the Court. For the reasons stated in the foregoing ~~339~~ opinion, the judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

A Mortgagee may be given the right to the possession of the premises as additional security for the debt: *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203. As to the rights and liabilities of a mortgagee in possession as to rents and profits, see *Baker v. Cunningham*, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490, and cases cited in the cross-reference note thereto; monographic notes to *Caldwell v. Hall*, 4 Am. St. Rep. 70, 71; *Hardin v. Hardin*, 27 Am. St. Rep. 793, 794.

FRAAMAN v. FRAAMAN.

[64 Neb. 472, 90 N. W. 245.]

COLLATERAL ATTACK.—When a Court Acquires Jurisdiction, it has the right to decide every question which arises in the case; and its judgment, however erroneous, cannot be collaterally assailed. Advantage of the errors can be taken only by proceedings in error or appeal to the supreme court. (p. 651.)

JUDGMENTS FOR ALIMONY are Liens on Homesteads.—A Judgment for alimony in favor of a wife is a lien on the family homestead, the title whereof is in the husband. (p. 651.)

EXECUTION SALE—Determining Debtor's Interest in the Land—Apportionment of Liens.—A statute authorizing appraisers in determining a judgment debtor's interest in land for the purpose of judicial sale, to deduct the amount of all liens, does not confer authority to deduct a part of the liens, or apportion them upon the several parcels of the entire tract, to determine his interest in any one parcel. (p. 652.)

EXECUTION SALE—Adjournment and Readvertisement.—There are no statutory provisions for the adjournment of an execution sale, in Nebraska, either by the court or the sheriff; and if a sale does not take place as provided by the notice, it should be readvertised. (p. 653.)

Frank E. Beeman, for the appellant.

Macfarland & May and J. M. Easterling, for the appellee.

473 DAY, C. On April 5, 1898, in the district court for Douglas county, the appellee obtained a decree of divorce from appellant and a judgment for alimony in the sum of six hundred and fifty dollars—five hundred dollars for herself and one hundred and fifty as an attorney's fee. A transcript of this judgment was filed in the office of the clerk of the district court for Buffalo county, and an execution issued thereon and levied upon certain real estate of the appellant. The premises were appraised, advertised for sale and sold, and the sale confirmed. From the order confirming the sale the appellant brings the case to this court by appeal.

A number of objections, both to the appraisement and the confirmation of the sale were urged, and, as some of them may again arise in the further proceedings of this case, we deem it proper to pass upon them now.

The first objection to the confirmation was that the decree which formed the basis of the sale was a nullity. This contention is based upon the fact that the appellant was not permitted to defend or introduce any evidence in his behalf upon the trial because he had failed to comply with the order of the

court requiring him to pay temporary alimony and attorney's fees. Whatever might be the views of this court upon the question thus sought to be raised, had an appeal or error been taken from the judgment of the lower court, it seems clear to us that this question cannot now be raised by an objection to the sale. If it was an error of the trial court, advantage of it could ⁴⁷⁴ only be taken by a direct proceeding by error or appeal to this court. The rule is well settled that, where a court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed. If the appellant felt himself aggrieved by the ruling and orders of the trial court, and desired to have them reviewed by this court, he had a plain and adequate remedy by an appeal or error proceeding. He did, in fact, appeal to this court, but dismissed his appeal before the case was reached in its order.

The next objection urged is that the property sought to be sold is the homestead of the appellant. The testimony tends to show that appellant and one of his minor children were occupying the premises as a home. The testimony as to the homestead character of the premises is not very clear. But granting that it were sufficiently established, still the objection would not be good. This court has held in *Best v. Zutavern*, 53 Neb. 604, 74 N. W. 64, that a judgment for alimony in favor of the wife, rendered in an action for divorce, is a lien on the family homestead, the title whereof is in the husband. Chief Justice Sullivan, the writer of that opinion, says: "The husband's right to an exempt homestead cannot, we think, be asserted against the wife who has been forced by his aggression to leave his domicile, and who, in an action for divorce, has obtained a judgment for alimony against him. The homestead law is a family shield, and cannot be employed by either spouse to wrong the other. The supreme court of Kansas, under a statute which authorized the court, upon granting a divorce, to award the wife such share of the husband's real or personal estate as shall be just and reasonable, held that the court has power to award the wife possession of the family homestead, the title of which is in him: *Brandon v. Brandon*, 14 Kan. 342. And, in a later case, it was decided by the same court that a decree which was declared to be a lien on all the husband's realty was a valid lien on the family homestead: *Blankenship v. Blankenship*, 19 Kan. 159. The logic of these decisions is that exemption statutes are not designed to protect the husband against the wife's claim for ali-

mony. To the same effect are the cases of *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334, and *Daniels v. Morris*, 54 Iowa, 369, 6 N. W. 532."

An objection was urged to the appraisement, and particularly to the manner in which the appraisers arrived at the value of appellant's interest in the land. The levy was made upon one hundred and sixty acres described in three tracts, as follows: "West half of the northeast quarter and the southeast quarter of the northeast quarter, and the northeast quarter of the northeast quarter of section 13," etc. The certificates of liens furnished by the register of deeds and the county treasurer pursuant to the request of the sheriff showed two mortgages and some unpaid taxes upon the whole quarter section. In determining the value of appellant's interest in the west half of said quarter section, the appraisers deducted from the gross valuation of said west half an amount equal to one-half the face value of the two mortgages and taxes. The same method was followed with reference to the two forty-acre tracts in the east half of said quarter section. In other words, the appraisers apportioned the several liens upon the three parcels of land levied upon in proportion to area. The only authority the appraisers have for deducting prior liens is that given by section 491b of the Code of Civil Procedure, which provides that the appraisers "shall deduct from the real value of the lands and tenements levied on the amount of all liens and encumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and encumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, or persons, or corporation against whom or which the execution is levied." This authority to deduct the amount of all liens does not confer the right on the appraisers to deduct a part of the liens, or apportion them upon the several ⁴⁷⁶ parcels of the entire tract. We think the action of the appraisers in apportioning the liens for the purpose of determining the value of appellant's interest was beyond their power.

Another objection to the confirmation was that the sale was duly advertised to be made on September 26, 1899, at 10 o'clock, but the return shows that it was made on September 27, 1899, at 10 o'clock. There is nothing in the record showing an adjournment of the sale, if, indeed, an adjournment could properly be made, and no order of the court was entered with reference thereto. It appears in the briefs that the sale was not

made on account of the pending of an injunction, which on September 26th had not been finally determined. There are no statutory provisions for an adjournment of an execution sale either by the court or the sheriff. Section 497 of the code expressly provides that lands and tenements taken upon execution shall not be sold until the officer causes public notice to be given of the time and place of sale, at least thirty days before the date of sale, and further provides that "all sales made without such advertisement shall be set aside." These provisions of the statute are mandatory, and must be complied with. When the sale did not take place on the 26th, as provided in the notice, it should have been readvertised.

There are a number of other objections urged in the briefs of counsel for appellant, but as they are not likely to occur upon a reappraisement and sale of the property, they will not be considered.

We therefore recommend that the judgment of confirmation and the appraisement be set aside, and the cause remanded for further proceedings.

Hastings and Kirkpatrick, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of confirmation and the appraisement are set aside, and the cause remanded for further proceedings.

ADJOURNMENT OF EXECUTION AND JUDICIAL SALES.

- I. Authority to Adjourn.
 - a. In General.
 - b. In Mortgage, Probate, Tax and Other Sales.
 - c. Persons Who may Adjourn Sales.
- II. Grounds for Adjournment.
 - a. What Constitute.
- III. Duty and Liability of the Officer.
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- V. Officer's Return of the Adjournment.
 - a. Sufficiency of.
- VI. Validity and Effect of Adjournment.
 - a. Validity of.
 - b. Effect of.

I. Authority to Adjourn.

a. In General.—It has long been the practice in the American commonwealths, when an officer in charge of an execution or judicial sale finds that the property is about to be sacrificed, to order

an adjournment. There is obvious propriety in such a course; and the law recognizes the authority of the officer, in the exercise of a sound discretion, to change both the time and place of the sale, when for any reason it cannot, consistently with the rights of the parties or the performance of his official duties, take place as originally appointed: *Phelps v. Conover*, 25 Ill. 309; *Thornton v. Boyden*, 31 Ill. 200; *Coriell v. Ham*, 4 G. Greene (Iowa), 455, 61 Am. Dec. 134; *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532; *Tinkom v. Purdys*, 5 Johns. 345; *Mordecai v. Speight*, 14 N. C. (3 Dev.) 428, 24 Am. Dec. 266; *McCormick v. Meason*, 1 Serg. & R. 92; *Hollister v. Vanderlin*, 165 Pa. St. 248, 44 Am. St. Rep. 657, 30 Atl. 202; *Aldrich v. Wilcox*, 10 R. I. 405; *Jewett v. Guyer*, 38 Vt. 209; *Pair v. Storm*, 37 Wis. 247; *Richards v. Holmes*, 59 U. S. (18 How.) 143, 147. See, too, *Magwood v. Butler*, 1 Harp. Eq. (S. C.) 265; *Hillard Bros. v. Wilson*, 76 Tex. 180, 13 S. W. 25; *Max Meadows Land etc. Co. v. McGavock*, 96 Va. 131, 30 S. E. 460. Some of the older authorities say that in case the property will be sacrificed, he should return that it was not sold for want of bidders, and wait for a venditioni exponas: *Reynolds v. Nye*, 1 Freem. Ch. (Mass.) 462; *Conway v. Nolte*, 11 Mo. 74; *United States v. Drennin*, 1 Hempst. 320, Fed. Cas. No. 14,992; and probably this was the rule of the common law, the venditioni exponas, in such a case, being interpreted to mean, "Sell for the best price you can obtain": *Reynolds v. Hoxsie*, 6 R. I. 463; *Leaders v. Danvers*, 1 Bos. & P. 359; *Keightley v. Birch*, 3 Camp. 521.

"The practice has been," says Chief Justice Ames in *Reynolds v. Hoxsie*, 6 R. I. 463, 467, "for officers charged with executions, for good cause, to adjourn sales of property, real or personal, levied upon by them, duly advertising the change of the time of sale, that there may not be a failure for want of buyers. Such power of adjournment was always deemed incidental to the power to sell; the whole of which was intrusted by the execution, under the law, to the officer. No other order was ever issued to him than the execution, a venditioni exponas being wholly unknown to the simplicity of our practice. Within the limits of the law, the officer exercised his discretion with regard to the time of sale; and as no positive publication of the necessary power of adjournment existed upon the statute book, adjourned the sale from time to time, as the exigencies of the case required. If he could not from storms or accident, reach the place of sale; if, reaching it, from want of buyers, he could not sell, or could not sell except at a great sacrifice; in fine, if from any cause, consistently with the performance of his general duty under the execution, the sale could not take place at the time originally appointed, he appointed another time at which it might. Nor was the practice peculiar to ourselves; but in other states this same incidental power was not only possessed, but in proper cases required to be exercised, by sheriffs charged with sales

upon execution, as a part of their duty''; citing, among other cases, Warren v. Leland, 9 Mass. 265; Lantz v. Worthington, 4 Pa. St. 153, 45 Am. Dec. 682.

And this power to adjourn is not limited by a statute providing that ''in case of accidents or extraordinary storms or tempests,'' the sheriff may postpone the sale: Aldrich v. Grimes, 14 R. I. 219. But a sheriff cannot, for his own gain, bind himself by contract not to sell for such a period as will prevent him from obeying the command of his process: Perkins v. Proud, 62 Barb. 420.

An officer may withdraw property offered for sale at public outcry after bids have been received and cried, but before it has been knocked off to the highest bidder: Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28, 40 S. E. 244; Miller v. Law, 10 Rich. Eq. (S. C.) 320, 73 Am. Dec. 92. See, further, ''Validity and Effect of Adjournment,'' post.

b. In Mortgage, Probate, Tax, and Other Sales.—The power of adjournment as above enunciated, which perhaps is applied with greatest frequency to execution sales, seems applicable, within proper bounds and limitations, to all classes of sales which are judicial in their nature as distinguished from those purely private and voluntary. An executor or administrator may lawfully postpone a sale of his decedent's property if in so doing he exercises a sound discretion and acts with a view to the best interests of the parties: Norris v. Howe, 15 Mass. 175; Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692; Gillespie's Estate, 10 Watts (Pa.), 300; Lamb v. Lamb, 1 Spears Eq. (S. C.) 289, 40 Am. Dec. 618. And the court or officer in charge of a mortgage foreclosure has a discretion, for good cause shown, to adjourn the sale: Kelly v. Israel, 11 Paige, 147; Collier v. Whipple, 13 Wend. 224, 229; Angel v. Clark, 47 N. Y. Supp. 731, 21 App. Div. 339; Farmers' Loan etc. Co. v. Oxford Iron Co., 13 Fed. 169; Bound v. South Carolina Ry. Co., 55 Fed. 186; Blossom v. Railroad Co., 70 U. S. (3 Wall.) 196. So has a trustee in a trust deed or a mortgagee in a mortgage containing a power of sale: See the monographic notes to Tyler v. Herring, 19 Am. St. Rep. 291; Houston v. National etc. Loan Assn., 92 Am. St. Rep. 588-590, where this aspect of the subject under consideration has heretofore engaged our attention at considerable length. And the officer conducting a tax sale, unless the statutes leave him no discretion, has power to make an adjournment: Wells v. Austin, 59 Vt. 157, 10 Atl. 405. A statute directing a collector of taxes to continue the sale from day to day as long as there are bidders, or until the taxes are paid, does not prevent him from adjourning over Thanksgiving Day: Lynch v. Donnell, 104 Mo. 519, 15 S. W. 927. Ordinarily, however, statutes providing that tax sales may be continued from day to day until completed appear to prohibit any other adjournment except from day to day: Collins v. Sherwood, 50 W. Va. 138, 40 S. E. 603. For decisions bearing on the question

of adjournment of tax sales under the special statutes of various states, see *Spain v. Johnson*, 31 Ark. 314; *Clark v. Thompson*, 37 Iowa, 536; *Phelps v. Meade*, 41 Iowa, 470; *Chandler v. Keeler*, 46 Iowa, 596; *Houghton County v. Attorney General*, 41 Mich. 28, 1 N. W. 890; *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330; *Wood v. Meyer*, 36 Wis. 808.

c. **Persons Who may Adjourn Sales.**—The law is not entirely clear as to whether the person upon whom the law casts the duty to conduct a judicial sale can delegate his authority to adjourn it. Probably there is no doubt that the discretion to adjourn cannot be delegated; but if the discretion has been exercised, and an adjournment determined upon, then the duty of making the announcement thereof becomes merely ministerial, and perhaps may be intrusted to another. However, the case of *Wolf v. Van Metre*, 27 Iowa, 348, throws doubt on this latter proposition, for it is there held that the sheriff cannot authorize the attorney of the plaintiff to adjourn an execution sale. But in *Hicks v. Willis*, 41 N. J. Eq. 515, 7 Atl. 507, it is decided that an executor or administrator, ordered by the court to make a sale of land, may lawfully adjourn the sale through the instrumentality of an attorney or agent. The maxim, "*Delegatus non potest delegare*," is held to have no application, for there is no delegation of trust or confidence in committing to an attorney or agent the performance of the ministerial act of announcing an adjournment in the stead of the trustee. See, in this connection, the note to *Gage v. Dudgeon*, 93 Am. St. Rep. 615.

The lien of an execution may be defeated or lost, so it has been held, by an order of the plaintiff's attorney to postpone the sale, and to allow the property to remain in the possession of the defendant, notwithstanding the attorney had no express authority or instructions from his attorney to make such order: *Albertson v. Goldsby*, 28 Ala. 711, 65 Am. Dec. 380. And when the return of an officer recites that an execution sale was adjourned from time to time by the direction of the plaintiff's attorney, the court will not say that the adjournments were not for "good cause" within the meaning of the statute: *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40.

II. Grounds for Adjournment.

a. **What Constitute.**—Whether or not adequate and sufficient reasons exist for the postponement of a judicial sale is, as has been seen, a question to be decided by the officer in charge in the exercise of a sound discretion. The first grounds for adjournment that naturally suggest themselves are insufficiency of the attendance and inadequacy of the bids. But the fact that only one bidder is present does not make an adjournment imperative; and, if the sale proceeds, it will not ordinarily be set aside: *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154, 48 N. E. 430; *Equitable Trust Co. v. Shrope*, 73 Iowa, 297, 34 N. W. 867; *Learned v. Geer*, 139 Mass. 31,

29 N. E. 215; *State v. Johnston*, 1 Hayw. (N. C.) 293; *Power v. Larabee*, 3 N. Dak. 502, 44 Am. St. Rep. 577, 57 N. W. 789. Compare *Ricketts v. Unangst*, 15 Pa. St. 90, 53 Am. Dec. 572; *McMichael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560. Yet if there are no bids, an adjournment is proper: *Sitzmon v. Pacquette*, 13 Wis. 291. This was an administrator's sale, and the adjournment was made by public announcement to the next day at the same place and hour. In case the amount of the bid at an execution sale is merely nominal, the officer should adjourn: *Roseman v. Miller*, 84 Ill. 297. See, also, the next paragraph. The postponement of a sheriff's sale should be made, even against the objections of the plaintiff, if necessary to prevent a sacrifice of the property: *McDonald v. Neislon*, 2 Cow. 139, 14 Am. Dec. 431. When land is sold subject to redemption, this gives the debtor a remedy, and is considered a strong circumstance in favor of upholding the sale when attacked because of the inadequacy of the amount bid: *Equitable Trust Co. v. Shrope*, 73 Iowa, 297, 34 N. W. 867.

If, because of the inclemency of the weather, a mortgage foreclosure sale is adjourned from the place where it was opened to a building some six hundred feet distant, and there completed about half an hour later, the persons in attendance having repaired to the place of adjournment, and there being no evidence that anyone was prejudiced, the sale is valid: *Morrissey v. Dean*, 97 Wis. 302, 72 N. W. 873. And it is the duty of administrator to adjourn a sale of his decedent's property if the day appointed is rainy and inclement, only a few persons attend, and the bids do not exceed one-half the value of the property: *Beaubien v. Poupard*, Harr. (Mich.) 206.

When the day appointed for a judicial sale falls on general election day, this is ground for adjournment: *Doe v. Bradley*, 10 N. C. (3 Hawks) 16. But the existence of war, as a general calamity, is no ground for postponing a sale: *Astor v. Romaine*, 1 Johns. Ch. 310. Nor should an adjournment be made on the suggestion of a person, not appearing to be a party to the litigation, on the ground that it is to take place on Saturday, and his religious faith does not permit him to do business on that day: *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887. The fact that the sheriff has heard, or has been unofficially advised, that there is some adverse claim of ownership to the property to be sold under execution, does not authorize him to decline to proceed with the sale: *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154, 48 N. E. 430. Nor does the fact that the widow, by spreading false reports to the effect that the title of the estate is subject to her dower, has embarrassed a previous attempted sale by the administrator, and probably will again do so, constitute a sufficient cause for suspending the surrogate's order of sale: *In re Lawrence*, 1 Redf. (N. Y.) 310.

Where the plaintiff in execution refuses to pay the costs, after having bid off the real property sold, the sheriff may consider the

sale a nullity, and adjourn it to another day: *Reese v. Dobbins*, 1 Iowa, 282, 1 N. W. 540. But if the defendant in execution makes no demand of the sheriff to have his fees taxed until the time when the sale is to take place, the officer need not postpone the sale in order to have them taxed: *Van Gelder v. Van Gelder*, 26 Hun, 356. See, further, in this connection, "Validity and Effect of the Adjournment," post.

III. Duty and Liability of the Officer.

The law does more than invest an officer with a discretion to adjourn a judicial sale of which he has the control; it imposes upon him the positive duty to adjourn, when the exigencies of the case require an adjournment, and holds him answerable for a dereliction of this duty: *Todd v. Hoagland*, 36 N. J. L. 352; *Birbeck etc. Loan Co. v. Gardner*, 55 N. J. Eq. 632, 37 Atl. 767. Of course, it is not an abuse of discretion in all cases for an officer to refuse to make an adjournment: *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832; *Cline v. Prall*, 27 N. J. Eq. 415. And his discretion, in the absence of bad faith, should be liberally considered: *Todd v. Hoagland*, 36 N. J. L. 352. It must be exercised with a fair and impartial attention to the interests of all parties concerned. He should not act capriciously, nor without cause, nor from improper motives. The law exacts no more than good faith and good judgment, but these cannot be dispensed with: *Swortzell v. Martin*, 16 Iowa, 520.

A sheriff who arbitrarily postpones an execution sale against the objection of the plaintiff, when there are several bidders present, one of whom will bid sufficient to prevent a sacrifice of the property, acts without authority, and is liable to the plaintiff for such damages as he sustains: *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154, 48 N. E. 430. So the postponement of a sheriff's sale by order of a person having no authority will subject the officer to liability, unless he can show that the judgment creditor acquiesced in the order: *Governor v. Vanmeter*, 9 Leigh, 18, 33 Am. Dec. 221.

IV. Notice and Advertisement of the Adjournment.

a. *Necessity and Sufficiency of.*—There is no little difference of judicial opinion as to what notice must be given of the time and place to which the adjournment of a judicial sale is made. Many authorities hold that for an adjourned sale the same notice is required as for the original sale, both as to manner and to time: *Thornton v. Boyden*, 31 Ill. 200; *Givan v. Doe*, 5 Blackf. (Ind.) 260; *Patten v. Stewart*, 26 Ind. 395; *Crocker v. Watkins*, 4 Mart., O. S., 540; *Montgomery v. Barrow*, 19 La. Ann. 169; *Enloe v. Miles*, 12 Smedes & M. (Miss.) 147; *Frederick v. Wheelock*, 3 Thomp. & C. (N. Y.) 210. See, also, the principal case, ante, p. 650. Other authorities maintain that the officer may give notice by proclamation, made in the presence and hearing of the persons assembled at the time and place originally fixed for the sale: *Coriell v. Ham*, 4 G. Greene (Iowa), 455,

61 Am. Dec. 134; *Coxe v. Halsted*, 2 N. J. Eq. 311; *Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 416; *Burd v. Dansdale*, 2 Binn. (Pa.) 80; *Richards v. Holmes*, 59 U. S. (18 How.) 143, 147. This is the statutory law in some states: *Wilson v. Bucknam*, 71 Me. 545; *Sanborn v. Chamberlain*, 101 Mass. 409. But, if this be conceded as the law, to render an adjourned sale legal, the notice must be given in the presence and hearing of the persons assembled at the time and place first fixed for the sale. If, after the persons assembled have dispersed and gone, the officer returns to the place of sale because of the purchaser's failure to comply with his bid and the conditions of the sale, and, shortly before the expiration of the advertised hour of sale, publicly announces that the sale is adjourned for two weeks, the adjournment is illegal and the sale under the notice is void: *Weatherby v. Slape*, 58 N. J. Eq. 550, 78 Am. St. Rep. 627, 43 Atl. 898.

The New York statutes provide for publishing notices of postponement in the case of mortgage sales: *Tuthill v. Tracy*, 31 N. Y. 157. The New Jersey statutes do not require that adjournments which do not exceed one week shall be advertised in the newspapers: *Hewitt v. Montclair Ry. Co.*, 25 N. J. Eq. 392. In Georgia the sheriff may resell the property on the same day without readvertisement, if a purchaser fails to comply with his bid, but he cannot set it up at a subsequent sale day without readvertisement: *Williams v. Barlow*, 49 Ga. 530; *Humphrey v. McGill*, 59 Ga. 649.

In *Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435, it is held that a sale may be postponed by announcing the fact at the time advertised, and giving notice by writing the same on the original notice, or putting notice thereof under the original. If notice of the adjournment is published at the foot of the original notice, it seems to be valid, though not dated: *Pier v. Storm*, 37 Wis. 247. The omission of the sheriff, in signing the notice of the postponement, to affix his official title, will be disregarded on a motion to confirm the sale: *Cord v. Hirsch*, 17 Wis. 403. And when the sheriff inserts the notice of adjournment under the original notice, and publishes it in that form, it need not be signed by him, if the first notice bears his signature: *Osgood v. Blackmore*, 59 Ill. 261. The day to which postponement is made should be specified: *Le Farge v. Van Wagenen*, 14 How. Pr. 54. And if only the notice of adjournment is published, and not the original notice also, the publication is insufficient if it does not contain the essential requisites of a notice of sale: *Sanborn v. Petter*, 35 Minn. 449, 29 N. W. 64.

In *Marcus v. Collamore*, 168 Mass. 56, 48 N. E. 432, a foreclosure sale, which had been advertised according to the requirements of the mortgage, was adjourned because no one was present, there being a temporary injunction against the sale. It was contended that when the first advertisement failed to bring anyone to the sale, it was the mortgagee's duty to advertise again as fully as before, but the court

said: "There is no absolute rule of law to that effect. The first advertisements are required by the mortgage. Any other or further duties of the mortgagee are less defined, and are embraced under the general obligation to make reasonable efforts to prevent a sacrifice of the property." It was also contended that the auctioneer should have made some proclamation of the adjournment. But, the fact of adjournment having been made public, the validity of this contention was also denied. It is not necessary to describe the land to be sold in advertising the adjournment of a judicial sale under the New Jersey statute, which provides for the publication of the notice when an adjournment is made for more than one week: *Avon-by-the-Sea Land etc. Co. v. Finn*, 56 N. J. Eq. 808, 41 Atl. 360.

As to the curing, by adjournment, of a defective notice given in the first instance, see "Validity and Effect of the Adjournment," post.

V. Officer's Return of the Adjournment.

a. **Sufficiency of.**—Under the Massachusetts statutes, if an officer's return of a judicial sale states that he "deemed it expedient to postpone the sale for the want of purchasers," it need not further state that he deemed the adjournment for the interests of all persons concerned: *Sanborn v. Chamberlain*, 101 Mass. 409; and the statement that he postponed the sale, "deeming it for the interest of all persons concerned," is sufficient, without stating further that he deemed it "expedient": *Ela v. Yeaw*, 158 Mass. 190, 33 N. E. 511. Under the Maine statutes, the return should show that the officer deemed the adjournment for the interest of all concerned, and that notice thereof by proclamation was given: *Wilson v. Bucknam*, 71 Me. 545. If a return recites that an adjournment was made by the direction of the plaintiff's attorney, the court will not say that it was not for "good cause" within the meaning of the statute: *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40.

VI. Validity and Effect of Adjournment.

a. **Validity of.**—If a sheriff, without instructions, adjourns a judicial sale from week to week in his office, and finally sells without any further advertisement, the owner being thereby misled, and having no knowledge of the sale, it is proper to set aside the sale upon equitable terms: *Chamberlain v. Larned*, 3 N. J. Eq. 295. So, if a sheriff is directed by the complainant's solicitor to stop the advertisement of a foreclosure sale, because it is enjoined, and the sheriff adjourns the sale from week to week for almost three years, no notice of the adjournments being given, or required by statute, in a newspaper; and, upon the injunction being dissolved, and without further or other notice, sells the property, realizing an amount far less than its value, the sale will be set aside on terms: *Trustees of Public Schools v. New Jersey etc. R. R. Co.*, 30 N. J. Eq. 494. In *Payne v. Billingham*, 10 Iowa, 360, it is held that the validity of an execution sale of personal property, as between the parties, is not

affected by the fact that it was postponed, at the instance and for the benefit of the defendant, for some fifteen months.

If a statute authorizes an adjournment, if necessary, from day to day, not exceeding three days, but an adjournment is made from the 16th of the month to the 22d, the sale will be illegal: *Crafts v. Eliotsville*, 47 Me. 141.

The adjournment by a sheriff of an execution sale to a future day, upon being served with an injunction restraining the sale, is irregular and in contravention of the injunction; and the fact that the adjournment, by chance, was to a time after the injunction was dissolved, does not help the matter; and a sale made at such time will be vacated where the judgment creditor is the purchaser: *Pettingill v. Moss*, 3 Minn. 222, 74 Am. Dec. 747.

b. Effect of.—A notice of a judicial sale, defective because not made or published for a sufficient length of time, is not cured by a postponement to a time sufficiently remote to satisfy the statutory requirements: *Sawyer v. Wilson*, 61 Me. 529; *Pratt v. Tinckom*, 21 Minn. 142.

A bid made before the adjournment of a judicial sale, but not accepted, is regarded as withdrawn by implication. It does not continue to subsist against the bidder, nor, on the other hand, entitle him, on leave to pay the amount thereof, to a confirmation of the sale: *Donaldson v. Kerr*, 6 Pa. St. 486; *Blossom v. Railroad Co.*, 70 U. S. (3 Wall.) 196.

The loss by depreciation in value of property levied upon so that it does not sell for enough to satisfy the execution, when there has been a postponement of the sale at the defendant's request, should not be sustained by the plaintiff: *Williams v. Gartrell*, 4 G. Greene (Iowa), 287.

An irregularity in the postponement of a judicial sale ordinarily does not render the sale void, but only voidable in an appropriate proceeding commenced in due season: *Jackson v. Spink*, 59 Ill. 404; *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369, 57 Pac. 110. The purchaser is not chargeable with notice of the irregularities, from the mere fact that he was present at the first sale and had notice of the adjourned sale: *Coriell v. Ham*, 4 G. Greene (Iowa), 455, 61 Am. Dec. 134.

The postponement of an execution sale, when properly made, does not affect the judgment creditor's rights; but if there is collusion or fraud, actual or constructive, he may lose his priority of lien. He may suffer this loss by leaving the property in the possession of the defendant: *Albertson v. Goldsby*, 28 Ala. 711, 65 Am. Dec. 380; *Ollis v. Kirkpatrick*, 3 Idaho, 247, 28 Pac. 435; *Sweetser v. Matson*, 153 Ill. 568, 46 Am. St. Rep. 911, 39 N. E. 1086; *Commonwealth v. Stremback*, 3 Rawle (Pa.), 341, 24 Am. Dec. 351; *Lantz v. Worthington*, 4 Pa. St. 682, 45 Am. Dec. 682; *Governor v. Vanmeter*, 9 Leigh, 18, 33 Am. Dec. 221.

ANTHONY & CO. v. KARBACH.

[64 Neb. 509, 90 N. W. 243.]

VACATION OF JUDGMENT.—The Dishonesty of His Attorney, whereby a client is prevented from making a defense, and judgment by default is taken against him, is an "unavoidable casualty or misfortune" within the meaning of that term when used in a statute as a ground for the vacating of judgments. (p. 664.)

VACATION OF JUDGMENTS.—The Verification of the Petition for the vacation of a judgment need not be in positive form. (p. 664.)

VACATION OF JUDGMENT—Filing of Answer.—If an answer was tendered by the plaintiff with his petition for the vacation of a judgment, and was before the court so that its sufficiency could be determined, the fact that it was not formally filed is not material. (p. 665.)

VACATION OF JUDGMENT—Special Findings.—A general finding, in proceedings to vacate a judgment, is sufficient to support an order of vacation, when no request for special findings has been made. (p. 665.)

B. N. Robertson, for the plaintiff in error.

E. J. Cornish, for the defendant in error.

510 ALBERT, C. This action was brought by Charles Karbach and Louis Raapke against Anthony & Co., to vacate a judgment in favor of the latter and against the former, rendered at the preceding term of the district court. A trial was had, resulting in a finding in favor of the plaintiffs and an order vacating the judgment and granting a new trial. The defendants bring the case here on error.

That portion of the petition which states the grounds upon which a vacation of the judgment is sought is as follows:

"Plaintiffs further allege that immediately upon being served with summons in said action, they went to the office of one _____, an attorney at law, in the city of Omaha, and practicing in all of the courts of said state, and retained and engaged said attorney to represent them in said action and stated to said attorney their defenses to said cause of action and further requested said _____ to correspond with all other defendants in said action and notify them of the pendency of said action. Said _____ accepted said employment and promised plaintiffs herein that he would attend to said action and would represent plaintiffs therein and would do all things necessary to be done to protect and care for the rights and interests of the plaintiffs

§11 in said action, and further would notify all other defendants that said action was pending. Plaintiffs further allege that several times following said agreement with said —, and prior to the rendition of judgment in said action they were informed by said — that he had notified the other defendants in said action, as promised by him and had received instructions from said parties to settle said case, that he had made investigation of the facts of said action and had prepared and filed an answer in said action and had done all other things necessary to protect the rights and interests of these plaintiffs in said action. Plaintiffs further allege that on the third day of July, 1899, being one of the days of the May, 1899, term of said district court, the above-named defendant, E. & H. T. Anthony & Co. procured a judgment of default to be entered against these plaintiffs in said action, and further a judgment against these plaintiffs in the sum of two thousand two hundred eleven dollars and twenty-five cents (\$2,211.25) and costs of suit, all without the knowledge and consent of these plaintiffs. Plaintiffs further allege that said May, 1899, term of said court came to an end on the thirty-first day of July, 1899. That they were not informed, nor did they know, that judgment had been entered in said cause until several days thereafter, to wit, about the fifth day of August; that then they also learned that said — had not notified their codefendants in said action, nor had he made any appearance whatever in said action, on the part of these plaintiffs, nor had he prepared or filed any answer in said action for these plaintiffs, but had wholly failed and neglected to perform any part of his duties as attorney for these plaintiffs in said action. Plaintiffs further allege that they relied wholly and implicitly upon the agreement made with said — to represent them in said action, and to interpose their defense therein, and relied upon the statement made to them by said — prior to the rendition of judgment in said action, that he had done all things necessary for the protection of the rights of these plaintiffs therein.”

§12 The defendants first insist that this case must be reversed because of the insufficiency of the petition. The sufficiency of the petition is challenged on three grounds, which we will consider in their order:

1. Because the facts stated therein are insufficient to entitle the plaintiffs to a vacation of the judgment, in that such facts do not bring the case within any of the grounds specified in section

602 of the Code of Civil Procedure, which provides for the vacation of judgments after the term at which they have been rendered. One of the grounds specified in that section is unavoidable casualty or misfortune, preventing the party from prosecuting or defending. The word "casualty" means accident; that which comes by chance, or without design, or without being a foreseen contingency. The word "misfortune" means ill-luck, ill-fortune, calamity, evil or cross accident. We do not believe it requires any stretch of language to hold that one who has suffered by the dishonesty of his attorney, an officer of the court, as shown by the record in this case, is a victim of casualty and misfortune, as above defined. Where any injury or mishap befalls one, through unforeseen circumstances, which cannot ordinarily be guarded against, it is misfortune: *Ex parte Burgess*, 57 L. T., N. S., 200. The supreme court of Iowa, in *Ennis v. Fourth Street Bldg. Assn.*, 102 Iowa, 520, 71 N. W. 426, held, where a party to an action employed an attorney, who filed an answer therein and agreed to appear and defend, and who absconded five days before the case was tried, and the case was tried, submitted, and a decree rendered without the knowledge of such party thereof, or of the absence of his attorney, that such facts constitute unavoidable casualty and misfortune, and entitled such party to have the decree set aside. On principle, the case just cited is not distinguishable from the case at bar.

2. Because the petition is not verified as required by section 603 of the Code of Civil Procedure. The verification, omitting the caption and jurat, is as follows:

"Charles J. Karbach, being first duly sworn says that he ⁵¹³ is one of the plaintiffs in the above-entitled action; that he knows the contents of the foregoing petition, and that the allegations therein contained are true as he verily believes."

The objection urged against this verification is that it is not in positive form. The provisions of section 603 do not differ materially from those of section 113, which provides for the verification of the petition in an ordinary action. That the verification would be good, under section 113, will be conceded. We can see no good reason why it should not be held good under section 603. We have not overlooked *Lander v. Abrahamson*, 34 Neb. 553, 52 N. W. 571, where, in the body of the opinion, it is held that the petition, in an action of this kind, must be verified positively. No good reason is given there for

the rule announced, nor was the point directly involved in the case. It is entirely omitted from the syllabus. In our opinion, it does not state the correct rule of practice and should not be followed. In our opinion the verification in this case is sufficient.

3. Because no answer was tendered with the petition. The sufficient answer to this is, that an answer was tendered with the petition. It is true it was not filed in the case as pleadings are usually filed; nor are we sure that it should have been. But it appears from the bill of exceptions that it was tendered with the petition as the answer of the defendants, and was before the court at every stage of the proceedings, whereby the court was enabled to judge of the sufficiency of the defense, upon which the plaintiffs expected to rely in the event that the judgment was vacated and a new trial was granted. That is the only purpose of requiring the plaintiffs to tender an answer with their petition.

It is next urged that the findings of the court are not sustained by sufficient evidence. It would serve no useful purpose to review the testimony at length. It will suffice to say that we have examined it with some care, and are satisfied that it is amply sufficient to sustain the material ⁵¹⁴ allegations of the petition, and shows conclusively that the defendants were the victims of casualty and misfortune, as hereinbefore defined, whereby they were prevented from making a defense to the action.

Complaint is made of the findings of the trial court because they do not show the grounds upon which the order vacating the judgment was made. The findings are general. We know of no rule of practice that requires the court to make specific findings, in the absence of a request therefor. No such request was made in this case. Consequently, the general finding is not only sufficient to sustain the order, but is in conformity with the settled rule of practice. We discover no error in the record, and therefore recommend that the judgment and order of the district court be affirmed.

Duffie and Ames, CC., concur.

By the Court.- For the reasons stated in the foregoing opinion, the judgment and order of the district court is affirmed.

The Vacation of Judgments on account of the negligence or mistake of an attorney is the subject of a recent note to *O'Brien v. Leach*, 96 Am. St. Rep. 108-111. A statute authorizing the court to relieve

from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect, authorizes the granting of such relief when the mistake, inadvertence, surprise, or neglect is that of the party's attorney: *O'Brien v. Leach*, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004. On the relief from judgments on the ground of fraud, see the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 232-254.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. SATTLE.

[64 Neb. 636, 90 N. W. 649.]

PASSENGERS—Effect of Leaving Train.—A passenger does not lose his character as such by leaving the train at a regular station at an intermediate point in his journey. (p. 668.)

PASSENGERS—Effect of Leaving Train.—One who, at an intermediate point in his journey, leaves the train at a place not intended for the discharge of passengers, and while the train is standing for some other purpose, assumes the ordinary risks incident to his action. (p. 670.)

PASSENGERS—Effect of Leaving Train.—A Statute prescribing the liability of a railroad company to "passengers while being transported over its road," applies to those who leave a train, in the course of their journey, upon express or implied invitation from the company, for any necessary purpose incident to the journey, but not to those who leave for some purpose of their own not incident to the journey, and at a place not designed for the discharge of passengers, although the company may then, under certain conditions, owe them the duty imposed upon carriers by the common law. (p. 674.)

PASSENGERS—Leaving Train for a Drink.—If a passenger, while his train stands at an intermediate station on a sidetrack to allow another train to pass, leaves his car to go to a pump for a drink, and, hurrying back, is struck while crossing the main track by the approaching train, which he could have seen, he is not a "passenger being transported over the road" within the meaning of that term as used in a statute prescribing the liability of railroads to passengers, and the railroad is not answerable for his death. (p. 675.)

M. A. Low, William F. Evans and Woolworth & McHugh, for the plaintiff in error.

Matthew Gering, for the defendant in error.

637 DUFFIE, C. John P. Sattler, the defendant in error, is administrator of the estate of Emanuel Leveroni. The deceased was killed by a train of the railroad company at the station of Alvo, in Cass county, Nebraska, on the 11th of April,

1899. The jury returned a verdict against the company for four thousand dollars, upon which judgment was entered, and the company ⁶³⁸ has brought the case to this court by petition in error.

There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alvo from the west on schedule time at 2:52 in the afternoon. On its arrival at the station the train went upon a sidetrack to await the arrival and passage of a west-bound train, which was then due at that point, its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the sidetrack, Leveroni left his train, crossed over the main track to the depot platform and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump and started on a run for his car, and in crossing the track upon which the west-bound train was approaching the station, was struck by the approaching train and instantly killed. The east-bound train upon which he was a traveler did not move from the sidetrack until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train.

Two questions are presented by this record for our determination: 1. Was the deceased a passenger, within the legal meaning of that word, after leaving his car while it was standing upon the sidetrack for the purpose of allowing an approaching train to pass? 2. If he was such passenger, can his administrator claim for him or his estate the benefits of the provisions of section 3 of chapter 72 of the Compiled Statutes of 1901?

Relating to the first question, the courts may be said ⁶³⁹ to be fairly divided. In Maine and Minnesota the rule appears to be that a passenger on a railway, who purchases a ticket for a distant station, and gets off the train temporarily, and without objection or notice, while it is stopping at an intermediate station, surrenders for the time being his place and rights of a

passenger: *State v. Grand Trunk Ry. Co.*, 58 Me. 176, 4 Am. Rep. 258; *De Kay v. Chicago etc. Ry. Co.*, 41 Minn. 178, 16 Am. St. Rep. 687, 43 N. W. 182. See, also, *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326. In *De Kay v. Chicago etc. Ry. Co.*, 41 Minn. 178, 16 Am. St. Rep. 687, 43 N. W. 182, the facts were very similar to the facts under consideration in the case at bar. The conclusion of the court upon these facts is well expressed in the syllabus of the case as follows: "Where a passenger enters a railway train and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station, he for the time being surrenders his place as a passenger, and takes upon himself the responsibility of his own movements. But if he leaves without objection on part of the company, he does no illegal act, and has a right to re-enter and resume his journey. While, if a railway company permits the practice of passengers leaving and re-entering their train, while on a sidetrack at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the sidetrack as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of 'All aboard!' by the conductor of the sidetracked train, give an assurance to those who have left their train that they may cross the main track in safety without looking for approaching trains. Passengers who have thus left their train, when they attempt to cross the track under these circumstances, are bound to exercise reasonable care ⁶⁴⁰ and caution to avoid injury from passing trains, and must use their senses for that purpose. The station platform and not the sidetrack is the proper place to enter or leave a train; and those who, for purposes of their own, use the latter, assume all the extra risks necessarily incident to such a practice, and are bound to exercise a degree of care corresponding to the increased risks." Another class of cases establish the rule that a passenger on a railroad train does not lose his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey: *Parsons v. New York etc. R. R. Co.*, 113 N. Y.

355, 10 Am. St. Rep. 450, 21 N. E. 145; Clussman v. Long Island R. Co., 9 Hun (N. Y.), 618.

Of the two classes of cases which we have been examining, we think that the latter establishes the better rule. In this country of long journeys by railway trains, there can be no impropriety in a passenger claiming the right, which may be said to be established by long custom, to leave his car at any intermediate point on his journey, where a stop of any considerable time is made, to send a message, to obtain exercise and relief by walking up and down the platform, or to gratify his curiosity, provided he does not interfere with the employés of the company, or run counter to any established rule brought to his notice. In the exercise of this privilege he does not lose his character of passenger, and the common-law duties of the carrier are still to be exercised in his behalf, and injuries received on account of a failure on the part of the carrier to observe all its duties toward him required by the rules of the common law must be responded to in an action for damages. We think that the supreme court of Massachusetts has announced the true rule in *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207, 12 Am. St. Rep. 541, 19 N. E. 373, where the following language is used: "To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he ⁶⁴¹ is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for passengers.

so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties."

All the cases agree that the carrier must furnish safe ingress and egress to and from the train for its passengers. In many of the larger stations the passenger has to cross two or three or four tracks in going to or from his train. In such cases he may assume that the company will see that his way across such tracks is clear and uninterrupted, and that no injury will be incurred in crossing the same. In *Jewett v. Klein*, 27 N. J. Eq. 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally ⁶⁴² from the platform of the station, and before his train had come to a full stop. Referring to this case, the supreme court of Colorado, in *Atchison etc. R. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, says: "By the foregoing and other well-considered cases, it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise that degree of care in crossing the railroad track as is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe; and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person not holding that relation. And this distinction is to be taken into consideration in determining the propriety of his conduct."

We do not care to extend this rule to passengers who leave the train at an intermediate station at a place other than that used by the carrier for the ingress and egress of its passengers. One who leaves the train at a point not intended for the discharge of passengers, and while the train is standing for some other purpose, must himself assume all the ordinary risks incident to his action. The cases above cited differ from the case at bar in the fact that the passenger left or boarded the train at its regular stopping place, and at the point where passengers were regularly received and discharged.

In the case now under consideration no stop was made to receive or discharge passengers. The train was not run to the depot platform but was sidetracked to allow the passage of the west-bound train. It is probably true that parties who desired

either to board or leave the train at Alvo, and who were aware of the custom of the train to sidetrack at that point to allow the west-bound train to pass, took advantage of the opportunity thus offered to take passage on the train, or to leave it while standing on the sidetrack; but no inducement to do this was extended by the company, as the evidence discloses that it refused to sell tickets to passengers who desired to take this train at that station. Those on the train must have ⁶⁴³ known that the stop upon the sidetrack was not for the purpose of receiving or discharging passengers, and those who left the train without any express or implied invitation so to do on the part of the company and without some known reason requiring them to do so, should in all reason, assume the natural and ordinary risks of their own voluntary action. A part of the fourth instruction of the court expresses so clearly our views upon this question that we insert it here: "If you find from the evidence that when the said Emanuel Leveroni left his car while standing on the sidetrack at Alvo, Nebraska, he did so without the invitation of the defendant either express or implied, and not for the purpose of attending to any personal want of his own, usually incident to a through passenger, nor made necessary by the manner in which the defendant's train was operated, then it was his duty while absent from said train, to exercise ordinary care to avoid any injury to himself, and if you find from the evidence that while so absent from his car he failed to exercise ordinary care, and was injured through his failure so to do, then the defendant would not be liable."

Having now defined what we believe to be the rights of a passenger at common law, we will proceed to examine our statute relating to injuries received by passengers while being so transported over a railway, and the questions discussed in the briefs of counsel in the light of that statute.

Section 3 of chapter 72 of our Compiled Statutes is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." In *Chicago etc. R. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434, it was held that this statute made a common carrier an insurer of the safety of its passengers, except as against the gross ⁶⁴⁴ negligence of the passenger, or his viola-

tion of some rule of the carrier brought to his notice; but up to this time this court has not been called on to determine the particular persons or class of persons taking passage with a railroad company, who were intended by the legislature to be included in the phrase "passengers being transported over its road." The plaintiff in error insists that the statute was not intended to cover all cases of injuries to passengers, and its position on this question cannot be more clearly or briefly stated than by quoting from its reply brief.

"Although no one but passengers can be brought within the section, yet it is not designed to cover injuries to all passengers. By express provision, as clear and positive as language will permit, the section carved out of the general body of passengers of a company the particular class thereof to which it applies. 'Every railroad shall be liable for all damages inflicted upon the person of passengers' (so reads the section) 'while being transported over its road.' The liability imposed by this section, with respect to injuries to passengers, extends only to those injuries which passengers receive while such passengers 'are being transported over its road.' The clause 'while being transported over its road' is a clear limitation modifying the general word 'passengers' in the section. Therefore, to bring a case within this section, it must be shown that when the injury was received by a person he was not only a passenger, but that at the time of the injury he was as such passenger 'being transported over the line of the railroad company.' There is, of course, a manifest reason for this qualifying clause. The purpose of the act was to relieve the passenger injured 'while being transported over the line of the company' from the necessity of specifically proving the act of negligence which caused the injury. The passenger who buys a ticket and takes his seat upon the train, may know that the court will presume that any injury which he receives on account of the operation or management of the train will be presumed ⁶⁴⁵ to be attributable to negligence on the part of the railroad company. The train and all agencies connected with its management belong to the railroad company. All knowledge with respect to the cause of injuries resulting from the operation or management of the train is known to the company, but these causes may be difficult for an injured person to ascertain. The section was designed to relieve the passenger, so injured, from the necessity of proving the specific act of negligence. This manifest reason for the adoption of this section shows the purpose of

the insertion of its provision 'while being transported over its road.' After a person leaves the train provided for his transportation, then whatever dangers he encounters are dangers not connected with the operation and management of his train, and if he is injured he must prove negligence and recover if at all, upon the common-law liability. While riding upon the train provided for his transportation, he may not be able to learn the cause of an injury so received, due to the operation and management of the train. Therefore, as was said, this section was provided to relieve him of the necessity of proving such acts. But when the passenger leaves the train provided for his transportation, and is injured by reason of dangers entirely disconnected from the operation and management of his train, then there will be no difficulty in his ascertaining the cause of his injury, and in alleging and proving it in case of suit. Therefore, the legislature did not intend that the presumption of negligence provided by the section should apply to such a case; and, to make the meaning clear, the legislature expressly made the section apply not to injuries to all passengers, but to injuries received by passengers 'while being transported over the road of the company.' The legislature having expressly limited the operation of the statute to the cases of injury received by passengers 'while being transported over the road of a company,' this court cannot obliterate the qualifying clause referred to. This court, in constructing this statute, must give effect to every provision thereof. ⁶⁴⁶ When the legislature expressly limited this section to cases of liability of injuries to those passengers only who were injured 'while being transported over the road of a company,' this court has no power or authority, nor will it have any inclination to nullify the express will of the legislature and to extend this section to cases which the legislature expressly excluded from its effect."

We are agreed that the words "while being transported over its road" is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many—perhaps most—roads provide eating-houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from

the car to the dining-room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining-room of the company he is under its control, and must conform to its rules, as fully as while on the train; and while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words "while being transported over its road" all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further includes those passengers leaving the train ⁶⁴⁷ for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same are furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose. Where, however, the passenger leaves the car for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he cannot claim the benefit of this statute, although the company may in such cases, under certain conditions, owe him the duty imposed on carriers by the common law, *Parsons v. New York etc. R. R. Co.*, 113 N. Y. 355, 10 Am. St. Rep. 450, 21 N. E. 145; *Gulf etc. Ry. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. 688. The only evidence offered by the company was that of one witness to show that there was plenty of good drinking water in the car in which the deceased was being carried. All of the testimony relating to the circumstances attending the killing of Leveroni came from the witnesses of the plaintiff below. These witnesses all testify that they distinctly heard the whistle of the train approaching from the east. Most of them testify that they saw Leveroni at the pump. One, a Mrs. Brown, a passenger sitting in the car, says that she saw him ascending the steps of the depot platform with a cup in his hand. All who saw him at the pump say that he filled his cup, but that, before he had time to drink, the whistle of the approaching train was heard; that Leveroni thereupon dropped the cup, and ran in a rapid manner for his train.

Mrs. Brown relates what occurred as follows: "He went from the steps to the pump, and pumped water into a tin cup which he had. He dropped it. The whistle blew. That is the first warning he had, I am confident." He left the train of his own volition while standing on the sidetrack, and for a wholly unnecessary purpose. In so doing he abandoned the protection of the statute. The witnesses agree that from the pump the railway track can be seen for the distance of one hundred feet toward the northeast, from which direction the train was approaching. ⁶⁴⁸ By taking three steps from the pump toward the main line of the road, the view is unobstructed for a mile or more, and the approaching train could have been seen for that distance. When Leveroni reached the track, running rapidly to reach his car, the train was about fifty feet away, and running at a high rate of speed. The evidence is convincing that Leveroni heard the whistle of the approaching train. It was that which caused him to drop his cup, and to run hurriedly to reach his car. He attempted to cross the track in a diagonal course, running partly in the same direction with the approaching train. This, however, is no reason why he should not turn his head to ascertain the position of the train, and whether it was safe to attempt to cross ahead of it. As we have seen, Leveroni was not, under the circumstances, "a passenger being transported over the road," within the meaning of the above quoted statute. His case must therefore be determined by the rules of the common law, in accordance with which he must be held to suffer the consequences of his own carelessness and negligence. With full knowledge, or full opportunity for knowing the danger, he left a place of safety on the platform of the depot and ran to his death.

We know of no rule of law that allows a recovery under such circumstances, and we recommend that the judgment of the district court be reversed and the case remanded for further proceedings according to law.

Ames and Albert, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded for further proceedings according to law.

Reversed and remanded.

Whether a Passenger loses his character as such by temporarily leaving the train at an intermediate station is a question upon which there is some diversity of judicial opinion. For leading cases on the

subject, see *State v. Grand Trunk Ry.*, 58 Me. 176, 4 Am. Rep. 258; *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207, 12 Am. Rep. 541, 19 N. E. 373; *De Kay v. Chicago etc. Ry. Co.*, 41 Minn. 178, 16 Am. St. Rep. 687, 43 N. W. 182; *Parsons v. New York etc. R. R. Co.*, 113 N. Y. 355, 10 Am. St. Rep. 450, 21 N. E. 145; *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326.

ILER v. ROSS.

[64 Neb. 710, 90 N. W. 869.]

MUNICIPAL CORPORATIONS—Garbage Ordinance.—In the exercise of its police power, a city may make needful regulations for the collection and removal of garbage, and for the licensing of those who engage in the business. (p. 679.)

MUNICIPAL CORPORATIONS—Garbage, Exclusive Privilege to Remove.—A city may grant an exclusive privilege to one person to collect and remove such noxious and unwholesome substances as are nuisances in themselves, and a menace to the public health if not promptly and properly disposed of. (p. 682.)

POLICE POWER, Limitations on.—The Legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights. The test, when such regulations are called in question, is whether they have some relation to the public health or welfare, and whether such is, in fact, the end sought to be attained. (p. 684.)

MUNICIPAL CORPORATIONS—Garbage, Exclusive Privilege to Remove.—A city cannot grant an exclusive privilege to one person to enter private premises and gather and remove, at the owner's expense, rubbish and waste material which, unless allowed to accumulate in unreasonable quantities, are not per se nuisances. (p. 686.)

W. J. Connell and W. H. Thompson, for the plaintiff in error.

I. J. Dunn, for the defendant in error.

⁷¹¹ **HOLCOMB, J.** The defendants in error, relators in the court below, sued out a writ of habeas corpus for the purpose of regaining their liberty from imprisonment in the city jail, where they were committed for the alleged violation of one of the ordinances of the city of Omaha, it being alleged as a ground for the issuance of the writ and contended at the trial that the section of the ordinance authorizing their conviction and imprisonment was null and void, and their detention, therefore, unlawful. A trial in the district court resulted in a judgment holding the section of the city ordinance under which the conviction was had void, and discharging the

relators from custody. The respondent, as custodian of the prisoners under the ⁷¹² commitment issued on conviction in the criminal trial, prosecutes error proceedings in this court for the purpose of obtaining a reversal of the judgment discharging the relators from custody.

The question determined in the lower court, and the only one of a substantial character involved in the controversy, is with relation to the validity of an ordinance numbered 4462, of the city of Omaha, entitled "An ordinance regulating the collection and removal of dead animals, garbage, manure, ashes, filth, offal, night soil and other refuse matter, providing penalties for the violation of the provisions hereof, and repealing ordinances numbered 3735, 3869, 4008, and 4080." Section 1 of said ordinance, which is the one directly bearing on the subject, and which it is contended is void, provides that any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil or other refuse matter within the corporate limits of the city of Omaha, not having a contract with said city so to do, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than five dollars nor more than twenty dollars. The relators were charged and convicted of unlawfully collecting and removing garbage, ashes, filth and other refuse matter without having a contract with the city, contrary to the provisions of said section 1. The object of the ordinance, which is rendered obvious from a reading of the whole of it, is to empower the city to enter into an exclusive contract with some individual, association or corporation to collect and remove within the corporate limits of the city all of the substances, materials and objects mentioned in section 1, which, if allowed to accumulate in a city, would become a nuisance; to provide maximum charges therefor, to be paid by the owner or occupant of the premises from which removed; to regulate the collection and removal; and to punish anyone engaging in such business without having a contract with the city therefor.

If the city is empowered to enact an ordinance providing ⁷¹³ that a contract shall first be entered into with it before any person is authorized to do any of the things prohibited, it follows as a legal sequence that the city may grant an exclusive right to one individual with whom it may enter into a contract and refuse to contract with all others; that is, if it is authorized to contract at all, it may lawfully contract with one or more, as may best suit its own views as to the propriety,

necessity and terms upon which it will enter into such contractual relation with another. Over the objections of the city, and for the purpose of showing the city was incapacitated from contracting with the relators, there was offered at the trial of the cause in the court below and received in evidence a contract with one McDonald, giving to him the exclusive right to collect and remove within the corporate limits all of the things mentioned in section 1 of the ordinance. Aside, however, from this evidence, we regard it as altogether clear that, if the section of the ordinance mentioned is sustained as valid, it must be done on the theory that the city may lawfully provide by exclusive contract for one contractor alone to engage in the business of collecting and removing the garbage and other waste matter mentioned in the ordinance, and to exclude all others from such business by suitable penalties for a violation of the provisions of the act. In fact, counsel for plaintiff in error fairly and frankly meets the issue by asserting in his brief: "The right to grant an exclusive contract and privilege, which necessarily includes the right to deny the privilege to another, has been fully settled by the decisions of this court." The issue is thus directly presented as to validity of the section of the ordinance under the provisions of which the relators were arrested, tried, convicted, and sentenced to imprisonment for its violation, the relators contending that such ordinance is void, as being an unwarranted invasion of private property rights in restraint of trade, creating a monopoly, and contrary to a sound public policy; while respondents maintain that it is a lawful exercise of the police powers invested in the ⁷¹⁴ city by its charter for the protection of the health of the inhabitants of the city, and to preserve and promote the public comfort and welfare.

This is the only issue adjudicated in the trial court, and as it involves the substantial merits of the controversy, and goes to the very core of the subject of the litigation, we are disposed to confine ourselves in the consideration of the cause to this question alone, to the exclusion of all collateral matters. The only exception contained in section 1 as to the right of any person save the contractor therein provided for to remove any of the substances spoken of, is a proviso that the act shall not apply to anyone hauling their own stable manure from their own premises with their own team or teams, and also a proviso regarding the use of manure for lawns, gardens, etc., under certain regulations, not necessary to mention. By section 11

the word "garbage," as used in the act, is defined to mean all refuse matter, animal or vegetable. It will thus be observed that the act is most sweeping in its character, and in effect, if valid, prohibits any resident of the city himself, or by the employment of another, from undertaking the collection or removal of any or either of the substances mentioned from his own premises, save the one exception noted as to the removal of stable manure by the owner or occupant from his own premises with his own team. All waste material, all accumulation of rubbish of whatsoever character, which, in time, if allowed to accumulate in large quantities, would doubtless become a nuisance, to abate which the city might employ any lawful means, can be collected and removed only by the contractor of the city at the expense of the private owner or occupant of the premises, at charges not exceeding the maximum rate allowed by the ordinance. Can such sweeping powers be justified as a valid exercise of the police powers of the city under its charter authority? By section 54 of the city charter act, the corporation is empowered "to make and enforce all police regulations for the good government, general welfare, health, safety ⁷¹⁵ and security of the city and the citizens thereof in addition to the police powers expressly granted herein and in the exercise of the police power may pass all needful and proper ordinances" (Comp. Stats., c. 12a), with provisions for penalties for violations of ordinances enacted under the provisions of said section. The right of a city, under charter acts such as the one we have quoted, to make all needful rules and regulations for the proper collection and removal of all forms of rubbish, waste and other refuse matter constantly accumulating in cities and towns, where the population is centered in a small territory, in order to protect the health of the inhabitants and preserve the public welfare, to provide the manner, method of collecting such material, and character of the vehicles in which the same shall be removed, and the place of depositing such refuse matter so as not to endanger the public health, and to license those engaging in such industry or business, seems so plain a proposition as to scarcely require elucidation or discussion, and is one on which the text-writers and the utterances of all the courts are in entire harmony. Such regulation was clearly contemplated by the legislature in the enactment of the statute quoted from, and to that extent, at least, there is left no room for doubt or difference of opinion: *People v. Gordon*, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N.

W. 658; *City of Ouray v. Corson*, 14 Colo. App. 345, 59 Pac. 876; *In re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Boehm v. City of Baltimore*, 61 Md. 259. In the last case cited it is said in the opinion: "The validity of these ordinances was not seriously questioned in argument. That they are a lawful and proper exercise of the power 'to preserve the health of the city and to prevent and remove nuisances,' does not admit of doubt. Such powers have been universally granted to municipal corporations in this country. In fact, the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws, in relation thereto have always been sustained in England, as within the incidental authority of ⁷¹⁶ such corporations." In this jurisdiction we are committed to the doctrine, from which we do not believe it wise to recede, although the authorities are divided, that as to those substances which are in themselves nuisances, and for the protection of the public health require speedy and prompt abatement and removal by the city, or some one by it authorized to perform the work, the exercise of the power is in its nature a public function, to be engaged in by the city in its own behalf or by the employment of such agencies as will best accomplish the desired result, and that regarding such matters the granting of an exclusive privilege by the city to one individual for the removal of such unwholesome substances is not an unlawful exercise of power, nor does it conflict with the principle of law opposed to the creation of monopolies or an invasion of personal rights. The power thus exercised is incidental to the right to prevent and abate nuisances for the better protection of the health of the inhabitants of the city, and to accomplish the desired result the corporation may adopt the method of acting through its own agencies, or one of its own choosing, and directly under its own direction and control. *Smiley v. MacDonald*, 42 Neb. 5, 47 Am. St. Rep. 684, 60 N. W. 355, is relied on by the city in the case at bar to sustain the ordinance under consideration. In that case, after quoting from the charter provisions as then existing, which it is to be noted are materially different from those of the present charter, it is said in the opinion, page 13: "It requires no argument to prove that the subject of the contract before us is within the strict letter of these provisions of the charter. . . . But the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is there-

fore a proper exercise of the police power." It is further held in the opinion that the fact of conferring an exclusive privilege was, as the case was presented, immaterial; that the power conferred by the charter on the city implied the right of the city to determine the means and agencies ⁷¹⁷ best adapted to the end in view. The ordinance then under consideration was not by any means of such sweeping character as the one under consideration in the present case. Many rights there reserved to the property owner and occupant as to the disposition of rubbish, debris, and other waste material are by the latter ordinance entirely swept away. As that case was presented and determined, we think it goes no further than to hold that the noxious and unwholesome substances such as dead animals not killed for food, garbage in the strict sense of the word, and probably other substances which are nuisances per se, might lawfully be removed by the city, in its exercise of lawful authority, for the protection and preservation of the health, comfort and welfare of the inhabitants, or the same end might be accomplished by creating an exclusive agency under the direct control of its own officers to perform the work necessary for such result. This is also the extent of the decision in the Michigan supreme court in the case of *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, also relied on in support of the contention of the respondent. In the case last cited was involved the question of the authority of the city, in the exercise of its police powers, to grant an exclusive license for the removal of garbage only. Under the ordinance then under consideration "garbage," as used therein, was defined to mean the refuse accumulation of animal or vegetable matter, liquid or otherwise, attending the preparation, use, cooking, dealing in, or storing meat, fish, fowl, fruit or vegetables. The court held this to mean such refuse and discarded matter of the kinds mentioned which in fact had been discarded and rejected as of no further use for any beneficial purpose for food of any kind, and that, when so considered, the substances were and should be regarded as in themselves nuisances, for the removal and abatement of which the city could lawfully, by ordinance, grant an exclusive license to one individual as an exercise of the police power for the benefit of the public health. It is ⁷¹⁸ also held that the granting of an exclusive license to remove such unwholesome matter is not in restraint of trade, such removal not being a business, trade or occupation within the meaning of the word when used

in stating the principle invoked for the purpose of having the ordinance declared void as being in restraint of trade.

The principle on which rests the right of a city to grant an exclusive privilege to collect and remove those noxious and unwholesome substances which menace the public health and endanger the welfare of the citizens seems to be that not only the prevention and abatement of those accumulations of substances which are in themselves nuisances and dangerous to the health of a community is necessary and essential for the preservation of health; but also because of their unwholesome and noxious character the proper and safe removal and disposition of such substances must for the benefit of the public welfare, be in such manner and methods, at such times, and over such particular routes of travel as will best subserve the public interests, and that this may best be accomplished when such removal is under the direct control and immediate supervision of the city authorities, or with an agency of its own selection, with whom it may contract for such purpose. It is as necessary that the abatement or removal of the nuisance shall be accomplished speedily, in a particular manner, and by certain fixed agencies, ever ready to act, and at all times under the control of the municipality, as it is that such nuisance shall not be permitted to exist in the first instance. It would, therefore, seem that as to those things which are calculated to menace the public health if not promptly and in a particular manner disposed of, and are in their nature regarded as nuisances within themselves, it is within the power of a city, for the benefit of the public health, and as a police regulation, not only to provide for the removal of such substances, but also, and as incident of the power of regulation, to grant an exclusive privilege to an individual or corporation by contract entered into for that purpose to perform ⁷¹⁹ the work of removal in such manner and methods as will best accomplish the desired result. It appears reasonably clear that such results can be obtained more satisfactorily and with less danger and inconvenience to the health and comfort of the inhabitants by the employment of one who shall at all times be subject to the control and direction of the city, and be held directly responsible to it for any failure to perform in the proper manner and promptly all that shall be necessary to effectuate the desired object. What may be termed for convenience the "dead animal contract cases" illustrate the principle and the reasons therefor most forcibly. In *River Rendering Co. v. Behr*, 7

Mo. App. 345, it is held that a city ordinance is valid, when passed as a sanitary police regulation, granting the exclusive right to remove the carcasses of dead animals from the streets. It is said in the opinion: "The municipal legislature is especially charged with the preservation of the public health. That high duty lies in prevention rather than in cure. It would be poorly discharged, or not discharged at all, if the surest and most well-known precautionary measures were not thoroughly put in practice against the introduction of disease. In a populous city, where large numbers of animals die every day, it is of the first importance that their carcasses be speedily removed from the centers of human habitation. The city authorities would be grossly derelict if they left the chances of removal to be determined by the owners of the animals or by the enterprise of possible purchasers. They are in duty bound to appoint special agencies for the purpose, and to render performance certain by whatever means their best judgment may suggest. If they find that this certainty can be secured only by confining the agency to a single person or corporation, upon terms of responsibility for a failure to perform, it is their duty and their privilege to so secure it. The agency so appointed is rather the instrument in the hands of the municipal authorities for the fulfillment of a public duty, than the beneficiary of an exclusive privilege." Says Mr. Justice ⁷²⁰Field in *Alpers v. San Francisco*, 32 Fed. 503, 505: "There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city, its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations."

But in the exercise of police powers conferred upon cities for the benefit of the health of the inhabitants and to preserve the public welfare and comfort, and conceding the right to take possession and remove through its own agencies, or by granting the exclusive privilege to one with whom they may contract for that purpose those substances which are inevitably

and intrinsically nuisances and injurious and unwholesome, can an ordinance be upheld and justified as broad and of so sweeping a character as the one under consideration, which includes all accumulations of ashes, stable manure, rubbish, debris, etc., many different kinds of which may properly be regarded of some utility to the owner or others and which are not per se noxious and harmful? Is a city empowered to contract with one individual, and authorize him exclusively to go upon the private premises of the inhabitants, collect and remove at the owner's expense all such substances, and to make it a penal offense for another to engage in the performance of the same kind of labor? Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor? The personal rights and property interests of the citizens have, with an unvarying rule, in all the authorities ⁷²¹ cited, been respected and preserved, and in *Smiley v. McDonald*, 42 Neb. 5, 47 Am. St. Rep. 684, 60 N. W. 355, is announced the same rule in the last paragraph of the syllabus, whercin it is held: "The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." By the provisions of the ordinance under consideration neither the owner nor occupant of the premises, nor a person employed for that purpose, can haul or transport within the corporate limits of the city any of the substances included in the ordinance, even though such material might be utilized for some beneficial purpose. He is prevented from disposing of it in any manner, and must submit to its collection and removal by the city contractor in the manner and by the means pointed out in the ordinance. Stable manure has value not only for the purpose of fertilizing lawns and gardens in the city, but is also highly prized by the thrifty husbandman in agricultural communities, because it enriches the soil and increases the yield of the crops. Cinders and ashes may be and are regarded as useful for many purposes. Many other substances coming within the meaning of the language of the ordinance in the nature of debris, rubbish, and other waste material which might be specifically mentioned could probably be used for some beneficial purpose, and many others having no utility like those referred to are not within

themselves nuisances and a menace to the health of the public. It is quite true their accumulation in unreasonable quantities and for unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed. These are all classed in the ordinance in the general category of dead animals, garbage, and other unwholesome and noxious substances, and made the subject of the same regulation under the provisions of the ordinance, and the right to collect and to remove all such material ⁷²² and substances given exclusively to the city garbage contractor. Such attempted regulation is, in our judgment, unreasonable, oppressive and contrary to a sound public policy. The ordinance not only grants a monopoly, always odious in the eye of the law, without justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort and welfare, but is also an unwarranted invasion of the natural rights of the inhabitants of the city. It is true the banker, the merchant and the lawyer may remove from their own premises, and with their own teams, stable manure, but nothing else. The man without a team and the one who desires to earn an honest living in removing for others these things which are not in themselves injurious to health are completely debarred. The personal right of the individual must give way regarding all the matters mentioned to the exclusive right of the contractor to collect, transport and dispose of all such accumulations. Not only is the owner's property taken from him when he could perhaps dispose of it or make arrangements for its disposal to some advantage, but he is compelled to bear the expense of the taking. We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law. In *re* Petition of Vandine, 6 Pick. (Mass.) 187, 191, 17 Am. Dec. 351, it is said: "If the regulation is unreasonable it is void; if necessary for the good government of the society it is good." In *State v. Hill*, 126 N. C. 1139, 36 S. E. 326, it is held in the syllabus that an ordinance regulating scavenger work must be reasonable in its provisions and not necessarily interfere with natural rights; and if it does interfere with such rights the public necessity must appear. In the opinion it is said by the author: "The prisoner is not charged with carrying on the business of a public scavenger, but simply with doing the work for one man; and it is admitted in the argument that the effect of the ordinance would be to prevent the owner himself from remov-

ing the refuse from his own premises. This is clearly an interference ⁷²³ with a natural right, and, while this may be allowable on the ground of public necessity, some such necessity must appear, and the ordinance must be reasonable in its provisions": Citing in support thereof, *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 319; 2 *Wood on Nuisances*, 3d ed., sec. 745; *Mayor v. Radecke*, 49 Md. 217, 33 Am. Rep. 239. It is also there said (page 218, 49 Md., page 239, 53 Am. Rep.) what is pertinent to the case at bar: "We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not, under reasonable regulations, require anyone to take out license before acting as a public scavenger, or even do the work through its own officers." The right of reasonable regulation for the prevention of nuisances of every kind, and the method of removal through and over the streets of a city of all accumulations of refuse matter, rubbish and other waste material for the purpose of sanitation and in the interest of the general health and comfort of the inhabitants, should be and is fully recognized. It is but the exercise of an authority properly appertaining to a municipality in the interest of the public, and to promote and preserve the welfare and convenience of all the people; but there must be a line of demarcation beyond which the authorities cannot go without assuming powers in excess of those properly belonging to them, and in the case at bar we can but conclude that such powers have been transcended.

The ordinance is likewise invalid because it creates a monopoly. It is not competent for the city to grant an exclusive privilege to one individual to gather and remove those substances which are not per se nuisances. There can be, in the nature of things, no reasonable necessity for the city to gather and remove from the private premises of the inhabitants the accumulations of rubbish and ⁷²⁴ waste material which are not in themselves, and when not allowed to accumulate in unreasonable quantities, nuisances. How can it be said that a necessity exists, in order to protect the public health, to enter private grounds, and remove therefrom the refuse of the barn, ashes from the yard, and other material not offensive

in itself if not permitted to accumulate in large quantities and for an unreasonable length of time? By what process of reasoning can it be said that the owner may be deprived of the right to keep his premises neat and clean, and remove all such material as rapidly as it may accumulate in such quantities as to warrant its disposition, and under such reasonable regulation as to the method of removal as may be imposed by the authority of the city? Why and for what reason must he engage only the city contractor to perform such services? If such may be lawfully required in the interest of proper sanitation laws, then may not the city grant an exclusive privilege to perform all work of drayage, hauling of material of whatsoever description, in order that a possible nuisance may be prevented? It cannot, we think, be said, as was said in the Michigan case, *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, that the removal and hauling of such substances is not a trade or occupation recognized by law. It may well be doubted whether the reason given in that case for holding the exclusive privilege granted not a monopoly is a valid one. We are all cognizant of the fact that scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and been recognized and regulated for ages. Certainly, hauling refuse from barns, ashes, rubbish and other waste matter is a legitimate calling, and engaged in whenever opportunity affords by many as one of the means of acquiring a livelihood. Why license drays, scavenger wagons, teamsters and others engaged in hauling from place to place those things necessary to be carted from the owner's premises in cities and towns in order to prevent them from becoming ⁷²⁵ nuisances, if the trade and calling is not legitimate, and so regarded and recognized by law? The reason for the rule is fully stated and discussed in the case of *In re Lowe*, 54 Kan. 757, 39 Pac. 710, and, although its application in that case is not supported by the weight of authority, yet in the case at bar the principle should be applied, because the right to transport and remove rubbish, ashes, manure and other waste material not of itself a menace to the public health, must be regarded as a lawful calling, and the attempted deprivation of the right to engage in it by all who may comply with all reasonable regulations pertaining to the subject is in restraint of trade, and therefore void. It follows that in the enactment of the section of the city ordinance now under consideration the city exceeded its powers, and for

that reason the section should be, as was by the trial court, adjudged invalid and unenforceable.

The judgment of the district court is therefore accordingly affirmed.

POWER OF CITIES TO CREATE MONOPOLIES FOR THE REMOVAL OF GARBAGE AND NOXIOUS SUBSTANCES.

The right of a city, in the exercise of its general police powers, to adopt necessary and reasonable regulations for the collection, removal, and disposition of noxious and unwholesome substances accumulating within its limits, is unquestioned. As a sanitary measure and for the protection of the public health, it may prescribe the manner of collecting such material, the character of the vehicles to be used in removing it, the place of depositing it, and the method of disposing of it: *State v. Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 South. 481; *People v. Gordon*, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658; *Iler v. Ross* (the principal case), ante, p. 676. And as a part of such regulation, it is competent for a city to ordain, under a penalty, that no person shall gather and remove such waste, refuse, and offensive matter without having first obtained a license so to do. An ordinance to this effect is not invalid as being in restraint of trade or as creating a monopoly: *State v. Orr*, 68 Conn. 101, 35 Atl. 770; *Boehm v. Mayor etc. of Baltimore*, 61 Md. 259; *In re Vandine*, 23 Mass. (6 Pick.) 187, 17 Am. Dec. 351. In *City of Ouray v. Corson*, 14 Colo. App. 345, 59 Pac. 876, an ordinance establishing the office of city scavenger, and declaring that no other person, unless he has procured a license therefor, shall do scavenger work is upheld. But while the power of cities in matters of this kind is undoubted, still they must exercise their authority in a reasonable manner: *State v. Hill*, 126 N. C. 1139, 36 S. E. 326.

However, municipal corporations have gone further than merely to regulate and license the scavenger business, and have granted exclusive privileges to certain persons or corporations to collect and remove those noxious substances and products commonly denominated garbage. In *Walker v. Jameson*, 14 Ind. 591, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 864, an ordinance requiring householders to place all garbage, not destroyed by them on the premises, in proper receptacles convenient for removal by a public contractor, at the expense of the householder, and forbidding any person other than the contractor to interfere with or remove such garbage, is held valid as a health and sanitary measure. And a similar ruling is made in *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693, where it is decided that the board of supervisors of the city and county of San Francisco may provide for the removal and disposition of garbage and substances about to become a nuisance, by a contract giving one person or concern the exclusive right to

receive and cremate such materials for a fixed charge. This exclusive privilege was granted for a period of fifty years, and on the faith thereof the grantee expended large sums of money, especially in the erection of a crematory. In upholding the contract, the court approvingly cites the Indiana case just referred to.

The validity of contracts or ordinances, whereby the exclusive privilege of removing and disposing of garbage is conferred upon one person, has been questioned as being in restraint of trade or as creating a monopoly. If, however, such a privilege can be considered as incident to a proper exercise of the police power, the doctrine of monopolies, as understood in ordinary trades and businesses, does not apply. "The gathering of garbage," says Justice Long in *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, "is not a trade, business, or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health. The charter provisions recognize the fact that certain matter may be deleterious to public health, and dangerous to persons or property, and thus become a public nuisance; and the charter makes it the duty of the common council to declare any place, thing, or matter which may be deleterious to public health, or dangerous to persons or property, a public nuisance, and the council is given power to abate such nuisance. The ordinance treats garbage or offal as deleterious to public health, and directs the manner of its disposition for the benefit of the public health. It is one of the police regulations of the city for the benefit of the public health." The power of a city to create a monopoly for the removal of garbage is also recognized in *Smiley v. MacDonald*, 42 Neb. 5, 47 Am. St. Rep. 684, 60 N. W. 355; *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41. In the Michigan case, the words "garbage" and "offal" are defined "to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit or vegetables. These matters, in and of themselves, are regarded as nuisances; that is, the ordinary and accepted meaning of the words 'garbage' and 'offal' is such refuse matters that in and of themselves are nuisances." While the Nebraska cases place no such limitation on the doctrine they announce as is implied in the Michigan decision from the foregoing definition of "garbage," the supreme court of Nebraska, in the principal case, ante, page 676, expressly make such limitation, and holds that a city may grant an exclusive privilege by contract to one person to collect and remove those noxious and unwholesome substances which are nuisances per se and a menace to the public health, but that it may not grant a monopoly to one individual to enter upon the premises of private persons and at their expense

collect and remove those substances which may be regarded as of some utility to the owner and which are not in themselves nuisances when not permitted to accumulate in unreasonable quantities. Among these latter substances are mentioned ashes, cinders, stable manure, rubbish, and debris.

This distinction seems reasonable. Its only weakness, it would seem, consists in classifying the substances, and determining those which may, and those which may not, be the subject of a valid monopoly. That there may be such a classification, however, is recognized in *In re Lowe*, 54 Kan. 757, 39 Pac. 710, where Justice Allen makes this observation: "It will be observed that the ordinance under consideration authorizes the appointment of two or more persons as scavengers. It therefore places it in the power of the mayor to grant to two persons a monopoly of the scavengers' business within the limits of the city. While monopolies of any ordinary business are odious, we have seen that monopolies are upheld when deemed necessary in executing a duty incumbent on the city authorities or the legislature for the protection of the public health. It is sometimes a matter of great nicety and difficulty to determine whether a particular business or calling is in its nature so directly connected with the public welfare that the performance can be safely intrusted only to someone acting under public authority. So much of the business of the scavenger as consists in removing dead animals, it would seem, under the authorities, may properly be regarded as a public function for the discharge of which a monopoly may be created. But his ordinance goes further, and gives to scavengers the exclusive privilege, also, of cleaning privy vaults and cesspools, and of removing garbage, not only from the streets, but from the private premises of the citizens. By its terms, it would prohibit the owners from performing these services for themselves, or from employing anyone else than the persons appointed. It not only makes a monopoly of the cleaning of vaults and cesspools, which are necessarily offensive to the senses, but it also includes the removal of garbage. It would be somewhat difficult to say just what is included in the term 'garbage.' Webster defines it as 'properly that which is purged or cleansed away; the bowels of an animal; refuse parts of flesh; offal; hence the refuse animal and vegetable matter from a kitchen.' These regulations must leave a way open to every person who will comply with the requirements of the ordinance to engage, at least, in so much of the business of scavengers as relates to entering on private property and removing filth and garbage therefrom."

While the language of the Kansas decision is instructive as showing that, in the determination of the question whether an exclusive privilege may be granted to collect and remove waste substances, refuse matter, and the like, regard should be had as to whether the substance is of such a character as to be a special menace to the

public health and welfare, still, in so far as the case holds that a monopoly cannot be created for the removal and disposition of filth and "garbage," as that term is defined by Webster, it is hardly supported by authority.

The bodies of dead animals, not slain for food, belong to that class of substances which call for prompt and proper action in the matter of their removal and disposition, and there is no doubt that a city may grant an exclusive privilege to a public contractor to take charge and dispose of them: *Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605; *State v. Fisher*, 52 Mo. 174; *Alpers v. San Francisco*, 32 Fed. 503. But a proper regard must be paid to the property rights of the owner. They cannot be denied absolutely from the moment of the death of the animal. A dead animal is not a nuisance per se. The owner may still make a proper use of it, and he should be allowed a reasonable time and opportunity to do so: *State v. Morris*, 47 La. Ann. 1660, 18 South. 710; *Underwood v. Green*, 42 N. Y. 140. Accordingly, it has been held that an ordinance conferring upon one person the right to remove and appropriate all carcasses of animals found in the city, to the exclusion of the owners, is void as to carcasses that have not become a nuisance: *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6, reversing 7 Mo. App. 345. And it has also been held that an ordinance is invalid which allows the public contractor, who has the exclusive right to remove the bodies, such fees therefor that the owner cannot pay them and still realize anything for the carcass: *Knauer v. Louisville*, 20 Ky. Law Rep. 194, 45 S. W. 510. An ordinance granting to one person the exclusive privilege of removing the carcasses of animals found in the city, if they are not removed by the owner or his immediate employé or servant within twelve hours after death, and requiring the owner, if he does not intend himself to remove them, immediately to deposit a notice in a box provided for by the public contractor, is not objectionable as creating a monopoly, or as depriving persons of property without due process of law: *National Fertilizer Co. v. Lambert*, 48 Fed. 458.

The principles upon which is based the right of a municipality to grant an exclusive privilege to collect and remove such noxious and unwholesome substances and products as menace the public health and endanger the welfare of the citizens, are so fully and clearly set forth in the principal case that we refrain from entering into their consideration, and refer the reader to the able opinion of the Nebraska court, ante, pp. 676-687.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

LYNDE v. LYNDE.

[64 N. J. Eq. 736, 52 Atl. 694.]

ATTORNEY AND CLIENT—Summary Jurisdiction Over Attorneys.—If it appears that an attorney or solicitor has received, in his capacity as an officer of the court, any money which his duty requires him to pay over to his client, the court may exercise its summary disciplinary punitive powers to require him to do justice to his client. (p. 698.)

SUMMARY JURISDICTION Over Attorneys and Solicitors is not confined to matters arising out of litigation, but extends to any case where the employment of the attorney is so connected with his professional character as to afford the presumption that such character formed the ground of his employment by his client. (p. 699.)

SUMMARY JURISDICTION Over Attorneys.—A court will not desist from requiring its own attorney to do his duty to his client simply because the transaction in question arose in litigation in another court, nor because he is the attorney of another court practicing in the court exercising the summary jurisdiction. (p. 699.)

ATTORNEY AND CLIENT—Contingent Fee—Burden of Proof.—An attorney contracting for a contingent fee from his client has the burden to prove that the contract is a fair one for the client. (p. 702.)

MARRIAGE AND DIVORCE—Alimony—Assignment of.—A wife's claim for alimony upon divorce is purely a personal, and not in any sense a property, right, and is not susceptible of assignment by her to another, nor capable of enjoyment by her in anticipation. (p. 706.)

MARRIAGE AND DIVORCE—Alimony—Contract to Charge. Alimony granted upon divorce cannot be subjected in advance to a charge in favor of the attorney through whose services it is awarded, because the subject matter is not capable of assignment, and because a contract to such end is opposed to public policy. (p. 709.)

J. M. Dickinson and E. R. Walker, for the appellant.

R. V. Lindabury, for the respondent.

739 PITNEY, J. This is an appeal by Mrs. Lynde from an order made by the court of chancery dismissing a petition filed by her, in that court, wherein she prayed that the respondent, James Westervelt, who was her solicitor in the main cause, should be required to pay into court the sum of \$38,500, which he had received from the defendant in the cause in settlement of a controversy about alimony, so that out of the said sum a reasonable fee might be fixed and allowed to the solicitor for his services rendered to her, and the balance of the moneys might be paid to Mrs. Lynde.

The learned vice-chancellor who heard the matter refused the relief prayed for by Mrs. Lynde, on the ground that the facts shown did not warrant the exercise of the summary power of the court over a solicitor.

740 The undisputed facts are as follows: In the year 1893 Mrs. Lynde obtained, in the court of chancery, a decree of divorce *a vinculo matrimonii*. This decree, through inadvertence in its preparation, made no provision for the allowance of alimony. In the month of January, 1896, Mrs. Lynde, for the first time, met Westervelt, who was an attorney at law and solicitor in chancery of this state, and was also an attorney and counselor of the state of New York. She employed him to take proceedings in her behalf to recover alimony from her former husband. According to her insistment no express agreement was made between her and Westervelt as to his compensation. He sets up an alleged agreement for a contingent fee based upon the amount of the recovery. This question will be dealt with hereafter.

Whatever may have been the terms of the employment, it appears that, on the eleventh day of February, 1896, Westervelt, as her solicitor, filed a petition in the court of chancery, praying that the decree of divorce be opened and that it be amended by decreeing an allowance of alimony to Mrs. Lynde. To this petition her former husband, Charles W. Lynde, made appearance, and, after litigation, the court of chancery decided (*Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641) to permit Mrs. Lynde to make application, at the foot of the decree, for an allowance of alimony. From the order of the chancellor thus made an appeal was taken, and the order was affirmed by this court: *Lynde v. Lynde*, 55 N. J. Eq. 591, 39 Atl. 1114. Thereupon

further proceedings were had in the court of chancery, resulting in the making of a decree, on December 28, 1897, whereby it was adjudged and decreed that the said Charles W. Lynde should pay to Mrs. Lynde the sum of \$7,840 for alimony accrued from the filing of her petition to the date of the decree; a counsel fee of \$1,000, and her costs of suit, taxed at \$136.07, amounting, in the aggregate, to \$8,976.07; and the decree also required him to pay to her thereafter the sum of \$80 per week, from the date of the decree, as permanent alimony. The defendant, Lynde, was a resident of the state of New York. A receiver appointed by the chancellor was unable to obtain possession of any property of his in New Jersey in order to enforce the provisions of the decree. It therefore became necessary to ⁷⁴¹ take proceedings in the state of New York to enforce the payment of the accrued alimony mentioned in the decree of December 28, 1897, and to fasten upon Mr. Lynde the liability for alimony thereafter to accrue. For this purpose Westervelt began an action in the supreme court of New York, which, after trial, resulted in a money judgment in Mrs. Lynde's favor against her former husband for the amount of the alimony, counsel fee and costs specified in the New Jersey decree, and also for alimony at \$80 per week from the date of that decree until the entry of judgment in the New York suit, which was in the month of January, 1899. The money judgment amounted, with costs, to \$14,896.03. The same judgment directed the defendant to pay alimony to Mrs. Lynde thereafter at the rate of \$80 per week. On appeal from that judgment by the defendant the appellate division of the supreme court of the state of New York modified the judgment by reducing the amount of the recovery to the sum of \$8,840, with interest and costs, and by abrogating the equitable relief: *Lynde v. Lynde*, 41 N. Y. App. Div. 280, 58 N. Y. Supp. 567.

Thereupon Westervelt instituted three additional actions in the supreme court of New York, in each of which the relief asked was a money judgment for sundry installments of alimony that had fallen due since the decree of December 28, 1897.

About the same time both parties appealed from the decision of the appellate division to the court of appeals, and that court, in the month of April, 1900, affirmed the judgment of the appellate division in all respects: *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979. Thereupon each party sued out a writ of error from the United States supreme court,

and in that court the judgment of the New York court of appeals was affirmed: *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. Rep. 555. This decision was rendered April 15, 1901. Shortly thereafter a fifth action was commenced by Westervelt for Mrs. Lynde against her former husband in the state of New York. Its purpose does not appear, but presumably it was intended to recover an additional installment of alimony.

During the months of May, June and July, 1901, negotiations for settlement were in progress, which finally reached a conclusion on the twelfth day of July. It was closed by Westervelt with ⁷⁴² the opposing attorneys, in Mrs. Lynde's absence, but with her consent so far as the terms of settlement were concerned. In the settlement Westervelt received Charles W. Lynde's check for \$38,500, payable to Mrs. Lynde's order, and also his note, to her order, for \$2,500, payable in eight months upon condition that she should, if required, make deposition in court concerning a fact which, by the parties, was considered material in the settlement. For this consideration Mrs. Lynde released her husband from "all claims against him for or on account of any alimony or maintenance, past or future"; the New Jersey decree of December 28, 1897, and the New York judgment were both satisfied of record, and all pending actions were discontinued. It should be observed in passing that the New York judgment, as modified on appeal, was for only \$8,840, besides costs, and represented the alimony and counsel fee adjudged due to Mrs. Lynde by the New Jersey decree. The residue of the \$41,000 was paid, or agreed to be paid, by Charles W. Lynde for Mrs. Lynde's release of her pending actions for alimony from December 28, 1897, to July 12, 1901, and of her claim for future alimony.

As soon as the settlement was closed, Westervelt indorsed the \$38,500 check in Mrs. Lynde's name, and deposited it to the credit of his own account in bank. This indorsement was made under a power of attorney that Mrs. Lynde had given him on the same day, in anticipation of the settlement. Whether he had a right to use the power of attorney for this purpose is one of the questions arising in the present inquiry.

Having thus obtained possession of the \$38,500, Westervelt notified Mrs. Lynde by letter that the settlement had been closed at \$41,000 (this, of course, included the \$2,500 note), and that her share would be about \$19,000, promising to send a statement and forward her share at an early day. This notification brought Mrs. Lynde to his office, accompanied by one of her pres-

ent counsel, and a somewhat heated interview took place, during which she strenuously objected to the charges proposed to be made by Westervelt. A few days later he sent her by mail a statement made up entirely in accordance with his own insistence, charging her \$15,000 as his own fee for professional services, \$4,900 for fees of Mr. George H. Bruce and Messrs. Gayley & Fleming, who had been employed as counsel in the litigation, and the further sum of \$2,513.21 claimed to be due to Westervelt for taxed costs and disbursements; the charges amounting in all to \$22,413.21, and showing a balance due from him to her, according to his own contention, amounting to \$16,086.79. For the latter amount Westervelt sent her his check, made out to her order, on the face of which were written the words: "In full of all claims In re Lynde v. Lynde or otherwise." At the same time he sent her the conditional note for \$2,500 signed by her husband.

Mrs. Lynde refused to accept this check and note as payment in full from Westervelt, and thereupon filed her petition in the court of chancery invoking the aid of that court against him. This petition sets forth with some particularity the transactions alleged to have taken place between her and Westervelt, and prays that the money received by him as above mentioned may be forthwith paid into court to await the further order of the court; that out of that money a just and reasonable fee may be fixed and allowed to him for his services, and that the balance of the moneys so received may be paid to her. The petition is verified by her affidavit, and contains charges of improper and oppressive conduct on the part of Westervelt in the following respects, viz.:

(a) Improper conduct in securing possession of the money paid by Lynde upon the settlement; the averment being that in anticipation of the settlement Westervelt had induced her to give him a general power of attorney to indorse checks by false representations as to the purpose for which he intended to use it.

(b) That Westervelt, on obtaining the money, unjustly retained from it the charges above mentioned, aggregating \$22,513.21. She avers that Westervelt's charges were exorbitant and unconscionable; that she had never entered into any contract or agreement entitling him to retain such charges, and that she had not employed Mr. Bruce and Messrs. Gayley & Fleming, nor entered into any agreement with them.

(c) And the further charge that upon a dispute arising between Mrs. Lynde and Westervelt, with respect to his charges,

he had sent her a check for the amount conceded by him to be ⁷⁴⁴ due to her (\$16,086.79), on the face of which were written the words: "In full of all claims In re Lynde v. Lynde or otherwise"; so that she could not draw the money without admitting that she had no further claim against him.

Upon the filing of her petition and affidavit an order was made by the court of chancery requiring Westervelt to show cause why the prayer of the petition should not be granted. He appeared and filed an answer to the petition, accompanied by voluminous affidavits purporting to give a circumstantial account of the transactions in question.

He admits receipt of the proceeds of settlement, gives an account of the circumstances under which he obtained from her the power of attorney, which does not differ materially from her account of the matter, and admits without qualification the third charge above specified. At the same time he attempts to justify the fee of \$15,000 charged for his own services on the ground that at the time he was employed by Mrs. Lynde an express agreement was made between them to the effect that he should take proceedings in her behalf seeking to recover alimony from her husband, that she should pay the disbursements incident to such proceedings, and that for his services he should receive a fee contingent upon the recovery of alimony and proportionate to the amount recovered, to wit, one-third of the recovery if the matter did not involve protracted litigation or many appeals or an unusual amount of work; otherwise one-half of the recovery. He also says that some time after the commencement of his employment Mrs. Lynde authorized the employment of associate counsel, whose fees were to be paid by her out of the gross recovery, before division thereof under the contract between her and Westervelt. The charge of \$4,900 for counsel fees of associates is justified under this agreement. The charge of \$2,513.21 is claimed to be due to Westervelt for taxed costs and disbursements; how much of this amount represents disbursements and how much attorney's or solicitor's fees is not stated. The case was disposed of by the learned vice-chancellor upon the petition and answer, and the ex parte affidavits.

Before proceeding to a consideration of the merits, a question of jurisdiction requires to be dealt with. ⁷⁴⁵ The fundamental ground upon which rest the jurisdiction that is invoked in the present case is that attorneys and solicitors are officers of the respective courts in which they practice. They, like judges, clerks and sheriffs, are a part of the machinery of the law created

for the administration of justice. It is obvious that justice is not executed by the entry of a judgment or the making of a decree in favor of one suitor and against another; nor is it completely executed when the defeated suitor is required to discharge the liability thus imposed. If payment is made by him to the opposing solicitor, it is made to an officer of the court, and, in a broad sense, is paid into court, as truly so as if paid to the clerk. In order completely to execute justice, it still remains for that officer's just compensation to be paid and for the successful suitor to be dismissed with the net avails of the litigation.

It is on the ground of this relation that courts of justice, in favor of their officers, enforce a lien upon moneys, papers and documents that have come to their hands in the course of their duties to secure the payment of their fees. It is on the same ground that courts enforce the equitable rights of an attorney or solicitor against the proceeds of a judgment or decree not yet collected. And it is upon this ground that, when it appears that an attorney or solicitor has received, in his capacity as an officer of the court, any moneys which his duty requires him to pay over to the client, the court, if necessary, exercises its summary, disciplinary, punitive powers to require the attorney or solicitor to do justice to the client. Illustrative cases are numerous: *Phillips v. MacKay*, 54 N. J. L. 319, 23 Atl. 941; *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611; *Delaney v. Husband*, 64 N. J. L. 275, 45 Atl. 265; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Mercer v. Graves* (1872), L. R. 7 Q. B. 499; *In re Freston* (1883), L. R. 11 Q. B. Div. 545; *In re Dudley* (1883), L. R. 12 Q. B. Div. 44; *In re Grey* (1892), 2 Q. B. Div. 440.

In the present case Westervelt, in his answer, denies that the moneys in question were collected by him as a solicitor of the court of chancery or by virtue of any proceedings in that court, and alleges that the moneys were paid and collected by virtue of the actions that were brought by him for Mrs. Lynde in the supreme court of the state of New York. In his affidavit he says ⁷⁴⁶ that the settlement which resulted in the payment of the money was in no sense due to any proceedings in the court of chancery, except in so far as the decree of that court formed the basis of the several actions in the New York courts; that the moneys in question were not collected by him as an officer of the court of chancery, but as an attorney and counselor of New York, in suits begun and concluded in New York.

It has, however, been repeatedly held that the summary jurisdiction of the court over attorneys and solicitors is not even confined to matters arising out of litigation, but extends to any case "where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client." Such is the language of Chief Justice Abbott, in *In re Aitkin* (1820), 4 Barn. & Ald. 47. See, also, *In re Knight* (1822), 1 Bing. 91; *In re Gee* (1845), 2 Dowl. & L. 997; *In re Fairthorne* (1846), 3 Dowl. & L. 548.

Nor will the court desist from requiring its own attorney to do his duty simply because the transaction in question arose in litigation in another court: *Ex parte Bodenham* (1838), 8 Ad. & E. 959; *In re Greaves* (1827), 1 Crompt. & J. 374, note; *In re Paterson* (1832), 1 Dowl. Pr. 468; *Batterson v. Osborne*, 18 N. Y. Supp. 431, 63 Hun, 663.

Nor from requiring an attorney to perform his duty, although he be the attorney of another court, practicing in the court which exercises the summary jurisdiction: *Evans v. Duncombe* (1831), 1 Crompt. & J. 372, 1 Tyrw. 283; *Thompson v. Gordon* (1846), 15 Mees. & W. 611 (per Alderson, B.).

It is therefore deemed a matter of no practical consequence that, after the conclusion of the judicial proceedings in this state, litigation ensued in the state of New York, in which Mr. Westervelt appeared by virtue of his office as an attorney at law of that state. The foundation of Mrs. Lynde's claim was in New Jersey. The court of chancery had jurisdiction to decree alimony as incidental to the divorce. The money was paid in settlement of that decree, both with respect to alimony already accrued and with respect to the duty to pay alimony thereafter. And, so far as appears, no judgment was rendered in any of the New York ⁷⁴⁷ actions fixing the liability of Mr. Lynde, by the rendition of a money judgment, in any amount beyond that which had accrued prior to the making of the decree in the court of chancery. But, above all, the money came to Mr. Westervelt's hands by virtue of his original employment as a solicitor in chancery. Except for his holding that office, he would not have been concerned in the matter.

At this point it is further objected that Mr. Westervelt holds his commission to practice in this state, not from the court of chancery, but from the supreme court, to which court alone, it is said, he is amenable generally for his professional acts, wherever performed. This objection is without force. It does not even

raise the question whether attorneys of the supreme court, by virtue of that commission, have a right to appear as solicitors in the court of chancery. In this state, while there is a recognized distinction between the functions of an attorney at law and those of a solicitor in chancery, yet it is the practice, and has been so from time immemorial, that examinations for admission are held under the auspices of the supreme court, the successful candidates being commissioned by the governor as both attorneys and solicitors. But it is, as we conceive, quite immaterial, for the present purpose, whence Mr. Westervelt derived his authority to appear generally as a solicitor in chancery, or whether he had such authority. He admittedly accepted Mrs. Lynde's retainer to appear for her in that capacity, and did so appear. In consequence of that retainer and appearance he finally received the proceeds of the settlement, and he is therefore fully amenable to the summary jurisdiction of the court of chancery in the premises. This position is fully sustained by the authorities, already cited, as well as by the reason of the matter.

Turning now to the merits, we perceive that Mr. Westervelt is in possession of a large sum of money received in settlement of Mrs. Lynde's claim for alimony, past and future; that he asserts a lien upon this money for the amount of the fees and charges already mentioned, and that these fees and charges are justified upon the basis of an express agreement alleged to have been made before the commencement of the proceedings that resulted in the decree for alimony, by which agreement the solicitor was entitled to a large share of the amount recovered.

748 As already mentioned, Mrs. Lynde denies the making of this agreement. The circumstances of its alleged making, as disclosed by the answer and annexed affidavits, were as follows: Mrs. Lynde at the time resided in Trenton, and occupied a position of clerical employment there. Westervelt lived at Montclair, in this state, and had his office in the city of New York. He had been admitted to the bar of New Jersey in the month of June, 1895, as an attorney at law and solicitor in chancery. He was not admitted as a counselor in this state until the year 1900. He was introduced to Mrs. Lynde, in the month of January, 1896, by one Ball, a New York lawyer of eighteen years' standing, whose office was in a room adjoining that of Westervelt. Ball himself was a stranger to Mrs. Lynde. The circumstances of the introduction are detailed in the affidavits of Ball and of Westervelt. Ball swears that he is connected by marriage with the family of Charles W. Lynde, the

defendant; that in his capacity as attorney for the sister of Lynde's father, upon the settlement of the estate of the father, Ball obtained information with reference to the rights and interests of Mrs. Lynde and of Charles W. Lynde; that he wrote to Mrs. Lynde telling her that she had certain rights and interests which ought to be protected; that shortly thereafter she called at Ball's office and he had an interview with her and informed her of the facts out of which grew the proceedings thereafter taken in her behalf by Westervelt; that Mrs. Lynde requested him (Ball) to act as her attorney in obtaining her rights as against Mr. Lynde; that Ball thereupon explained to her that the proceedings necessary to be taken to obtain her rights would, in the first instance, require the services of a New Jersey attorney, and that he therefore could not personally act for her; but he informed her that he could refer her to a friend, who was a member of the New Jersey bar, who could act for her as attorney, and that he (Ball) would aid her by furnishing any information that was within his power; that Mrs. Lynde thereupon requested Ball to introduce her to said New Jersey attorney, and he complied, and introduced her to Westervelt; that Ball was present during the interview which ensued between Mrs. Lynde and Westervelt, and that in the course of that interview the agreement already ⁷⁴⁹ referred to was made between Mrs. Lynde and Westervelt. Westervelt himself gives a sworn account of the interview, which agrees substantially with that given by Ball. It also says it was he (Westervelt) who suggested taking up the case on a contingent fee; that Mrs. Lynde asked how much that would be, and that he replied that it was usual in such cases to charge from one-third to one-half, whereupon she agreed.

In what we shall hereafter say upon another topic, we must not be understood as in anywise approving the methods by which this agreement was procured, or assenting to the notion that such an agreement, made under such circumstances, would, in any event, be sustained. A client inexperienced in business, coming in response to an invitation, apparently reposing entire confidence in the lawyers and desiring their aid because of the information they possess, at the first interview, makes an agreement binding her to pay, in the event of a successful outcome of the litigation, a fee equal to one-third or one-half the amount recovered. On the lawyer's own story, the client accepted without question his statement as to the share customarily charged as a contingent fee. It would at the least seem that under such cir-

cumstances the burden would rest upon the attorney to show that the bargain was a fair one for the client. The late Chief Justice Beasley, in an opinion holding that because of the nonadoption in this state of the law of champerty and maintenance, a contract between attorney and client providing for a contingent fee, proportioned to the amount of the recovery, was not necessarily void, at the same time said: "Such contracts will be inspected with jealous vigilance by the courts on account of the delicacy of the relationship of the parties to them, and the most transparent candor and good faith are required on the part of the attorney in these dealings with his client": *Schomp v. Schenck*, 40 N. J. L. 195, 200, 29 Am. Rep. 219. And although the case cited by him related to a transaction occurring pendente lite, the same rule has been frequently applied to transactions occurring at or even before the employment of the attorney, the inquiry being whether there existed in fact a relation of trust and confidence between the parties: *Arden v. Patterson*, 5 Johns. Ch. 44 (per Chancellor ⁷⁵⁰ Kent); *Allison v. Mills*, 26 Conn. 213; *Taylor v. Bemiss*, 110 U. S. 42, 45, 3 Sup. Ct. Rep. 441 (per Miller, J.); *Ex parte Plitt* (1853), Fed. Cas. No. 11,228, 2 Wall. Jr. 453 (per Grier, J., at p. 476; per Kane, J., at p. 480); *Foster v. Jack* (1835), 4 Watts, 335, 339 (per Chief Justice Gibson); *County of Chester v. Barber* (1881), 97 Pa. St. 455, 463 (per Paxson, J.); *Brown v. Bulkley*, 14 N. J. Eq. 451, 458; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067; *Tate v. Williamson* (1866), L. R. 2 Ch. App. 55, 61.

But there is another question inherent in the admitted facts of this case, and that is, whether the subject matter of the supposed contract between Westervelt and Mrs. Lynde, to wit, her claim for allowance of alimony against her husband, was of such a nature as to admit of being subjected to an engagement of the kind referred to. It is obvious that if her claim was in its essence not assignable, if it was not property, nor a future interest in property, such as could be passed under an equitable assignment, the supposed contract cannot be sustained, even if made, and made under such circumstances as otherwise would entitle it to recognition and enforcement. For, if her claim was in its nature not assignable, it could not be subjected to an equitable lien by any contract between the parties. And, if any principle of public policy prohibits its assignment, the same result follows.

It is hardly necessary to say that the question thus raised is different from that in *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302,

24 Atl. 926, 53 N. J. Eq. 684, 33 Atl. 470, which related to the liability of a husband arising from his express agreement to pay to his wife a fixed allowance during her life for support of herself and her children. Nor is this case ruled by *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435, 52 N. J. Eq. 561, 46 Am. St. Rep. 528, 30 Atl. 676, 57 N. J. L. 508, 31 Atl. 1024; which had to do with proceedings in this state for enforcement of past due alimony decreed by the court of a sister state.

An examination into the history of the allowance of alimony, and the nature and uses of alimony, will demonstrate that a claim for such an allowance is far different from a right of property. It is not a right to recover damages or compensation for injury to property or person or for deprivation of property. Nor ⁷⁵¹ is it a claim for a property interest in a share of the husband's estate.

Alimony, in its origin, was the method by which the spiritual courts of England enforced the duty of support owed by the husband to the wife, during such time as they were legally separated pending the marriage relation. The courts of law could not adequately enforce this duty, but made a clumsy and circuitous attempt to do so, under some circumstances, by employing the fiction that a wife, living apart from her husband by reason of his fault, was his agent for the purpose of binding him to pay third parties for necessities furnished to her: *Manby v. Scott*, 2 Smith's Lead. Cas. *408 (502); *Snover v. Blair*, 25 N. J. L. 94; *Vusler v. Cox*, 53 N. J. L. 516, 22 Atl. 347.

At the common law a divorce from the bond of matrimony was granted by the ecclesiastical courts only for such causes as rendered the marriage void ab initio. Naturally, alimony was not allowed as an incident to such a divorce, for, there being no marriage, the duty of maintenance has not been undertaken: 2 Bishop on Marriage, Divorce, and Separation, sec. 855. Divorces a mensa et thoro, however, amounting merely to a legal separation, were granted for causes which rendered it improper or impossible for the parties to live together, and in such case the ecclesiastical court ordered a periodical allowance to be paid by the husband to the wife for her support, the amount thereof being settled at the discretion of the judge in view of all the circumstances of the case, taking into consideration especially the wife's needs and the husband's means. The spiritual courts reserved and exercised the power of varying the amount of the alimony, from time to time, as required by change of circum-

stances: 1 Blackstone's Commentaries, 441; 2 Bishop on Marriage, Divorce and Separation, sec. 828 et seq.

Divorces from the bond of matrimony were not granted by the ecclesiastical courts on the ground of adultery or for any other cause which supervened the marriage. For such causes, however, divorces were granted by act of parliament.

In this state the subject matter of divorce having been, by statute, committed to the court of chancery, and causes for absolute divorce having been allowed other than such as rendered the marriage void ab initio, there followed, as a logical consequence, ⁷⁵² the allowance of permanent alimony in cases of absolute divorce, as a means of enforcing the continuing duty of support which the husband owed to the wife, and of which he was not permitted to absolve himself by his own misconduct, although that misconduct resulted in a dissolution of the marriage.

By the act of December 2, 1794 (Pat. L. 1794, p. 143), giving jurisdiction to the court of chancery in cases of divorce and specifying the causes, it was, by section 7, provided as follows: "That when a divorce shall be decreed on account of the parties being within the prohibited degrees, or for the cause of adultery or extreme cruelty, the chancery shall, and may, in every such divorce, take such order touching the care and maintenance of the children of that marriage, and also touching the maintenance and alimony of the wife, or any allowance to be made to her, and, if any, the security to be given for the same, as, from the circumstances of the parties, and nature of the case, may be fit, equitable and just."

On February 3, 1818, a new act concerning divorce was passed (P. L. 1818, p. 20), by which the act of 1794 and a supplement thereto, passed in 1795, were repealed. This act of 1818 materially changed the law respecting divorces, and also, for the first time, authorized a suit by the wife against the husband for maintenance (without divorce) in case of abandonment and refusal or neglect to support his wife. The section providing for permanent alimony incidental to a suit for divorce is as follows:

"Sec. 9. That when a divorce shall be decreed *on account of the parties being within the prohibited degrees, or for the cause of adultery or extreme cruelty*, it shall and may be lawful for the court of chancery to take such order touching the alimony and maintenance of the wife and also touching the care and maintenance of the children, or any of them, by the said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, and in case a wife

is the complainant to order the defendant to give reasonable security for such alimony and maintenance, and upon his neglect or refusal to give such reasonable security as shall be required of him, or upon default of him and his surety, if any there be, to pay or provide such alimony and maintenance, to award and issue process for the immediate sequestration of the defendant's personal estate and the rents and profits of his real estate, and to appoint a receiver thereof and cause such personal estate, and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such maintenance and allowance, or ⁷⁵³ to such maintenance or allowance as to the said court shall from time to time seem reasonable and just, or to enforce the performance of the said decree or orders by such other lawful ways and means as is usual and according to the course and practice of the court of chancery."

In the revised divorce act of February 16, 1820 (P. L. 1820, p. 43; Rev. 1821, p. 667), section 9 was amended by omitting the words printed in italics above, the section, as thus amended, having the effect of permitting the allowance of permanent alimony on the granting of a divorce, irrespective of the cause of divorce. Section 9, as thus revised, is substantially identical with section 19 of the revised act concerning divorces, approved March 27, 1874: Gen. Stats. 1895, p. 1269.

An examination of the statute shows clearly that alimony is imposed as a personal duty upon the husband for the personal benefit and support of the wife, or of the wife and children, in case there be children. The amount of the allowance, the method of its enforcement, the method of its application, and the security to be exacted of the husband for its payment, are all confided to the discretion of the chancellor; and he is left at liberty to increase or decrease the amount of the alimony, from time to time, according to the circumstances of the case. It will be observed that the statutory scheme is modeled closely after the practice of the ecclesiastical courts of England with reference to alimony. The purpose is to require the husband to pay the wife periodically such sum as, in view of his circumstances and the necessities of the wife, will be a reasonable fulfillment of his continuing duty to support her. The purpose is not to enrich the wife. The ecclesiastical courts, indeed, would not ordinarily enforce arrears of alimony extending beyond a year: *De Blaquiére v. De Blaquiére* (1830), 3 Hagg. Ecc. 322. And it was in view of the close analogy between our statutory alimony and that allowed by the ecclesiastical courts that this court held that, by force of the

statute, alimony, as incidental to a divorce a vinculo, could not be given in a gross sum, nor in a portion of the real estate of the husband: *Calame v. Calame*, 25 N. J. Eq. 548. And the same view was adopted by the late Chancellor McGill, in *Lynde v. Lynde*, 54 N. J. Eq. 476, 35 Atl. 641, whose opinion was adopted by this court: 55 N. J. Eq. 591, 39 Atl. 1114.

⁷⁵⁴ It will be observed that in our statute alimony on a divorce a vinculo is placed on the same basis as that which is allowed on a divorce a mensa et thoro. Both are provided for by the same section of the act, and both are placed within the discretion of the court of chancery, so far as concerns their adjustment, from time to time, according to the varying circumstances of the parties: 2 Bishop on Marriage, Divorce and Separation, secs. 1038, 1048.

It follows, as a necessary consequence of what has been said, that a wife's claim for an allowance of alimony is a purely personal right, and not, in any sense, a property right. It is, in its nature, not susceptible of assignment by the wife to another, nor capable of enjoyment by her in anticipation. And this result is fully sustained by the authorities.

In *Miller v. Miller*, 1 N. J. Eq. 386, there were articles of separation binding the wife to accept a nominal sum annually for her support. Under the circumstances of the case it was held that she was not entitled to have the articles of separation set aside, but the master who heard the cause proceeded to inquire whether these articles would bar the complainant from the recovery of alimony, and he held they would not.

An examination of the English cases will be useful. In *Stones v. Cook* (1834), 7 Sim. 22, S. C. (1835), 8 Sim. 321, note, Vice-Chancellor Shadwell said that the ecclesiastical court would probably allow the wife's executors to enforce payment of arrears of alimony, accrued in her lifetime, against the husband, and that, for this reason, a bill in chancery in aid of the ecclesiastical jurisdiction was not necessary. But as the case was in doubt, the learned vice-chancellor overruled the demurrer. This decision was reversed by Lord-Chancellor Lyndhurst, who took it for granted that the claim for alimony must cease with the death of the wife; that executors might maintain a suit in the ecclesiastical court, but not for arrears in alimony; and that, notwithstanding this, there was no authority to warrant the court of chancery in entertaining a bill by the wife's executors against the husband for arrears of alimony accrued prior to her death.

In *Vandergucht v. De Blaquiere* (838), 8 Sim. 315, 7 L. J. Ch. 270, 2 Jur. 738, it appeared to the vice-chancellor that a married woman, living separate from her husband, after a decree of ⁷⁵⁵ divorce a mensa et thoro, and entitled to alimony under the sentence of the ecclesiastical court, had undertaken to charge future installments for payment of necessities purchased by her. Vice-Chancellor Shadwell said: "Alimony materially differs from separate property. It is liable to be varied by the ecclesiastical court according to the husband's circumstances; whereas, separate property always remains the same, whatever alteration may take place in the circumstances of the husband." Upon this ground he refused to enforce the charge. Afterward, however, additional proofs having been submitted, Lord Chancellor Cottenham varied the vice-chancellor's order with respect to a portion of the fund that had been subjected to the charge, on the ground that this portion appeared not to be the fruits of alimony, leaving untouched the title to the alimony: *Vandergucht v. De Blaquiere*, 5 Mylne & C. 229, 244, 3 Jur. 1116. It should be remarked that the circumstance of the wife's disability to contract, by reason of the coverture, was not alluded to in the case, and indeed is of no consequence. In equity, and also in the ecclesiastical law, a married woman was permitted to charge her separate estate; and so the real question in the case was whether alimony was separate property such as could be charged.

In *re Robinson* (1884), 27 Ch. Div. 160: In this case it appeared that the divorce court had made a decree for a judicial separation between the parties and had ordered the husband to pay permanent alimony to the wife in monthly payments. Afterward the husband was declared a lunatic, and, in the lunacy matter, an order was made for the payment out of his estate of an annuity to the wife, until further order, equivalent to the alimony theretofore decreed by the divorce court. After the making of this order the wife assigned the annuity to a third party, and the assignee applied by petition to have the annuity paid to him. It was held by the court of appeal that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was in either case not assignable. In the reasoning of the lords justices, the decision was based on the ground that the annual recurring payments (whether considered ⁷⁵⁶ strictly as alimony or not) were for the personal benefit of the wife, and were in their nature inalienable; that such

future payments were not in the nature of property, but were payments made to the wife for her maintenance, of which she could not deprive herself by anticipation.

Harrison v. Harrison (1888), 13 Prob. Div. 180: In this case a decree for dissolution of marriage had been made on the wife's petition, with an order requiring her husband to secure to her an annuity for life. It was held in the court of appeal that such an annuity, under the terms of the statute, differed from alimony in that it was not capable of being withdrawn. The annuity was therefore held to be property, such as might be subjected to a charge for the benefit of the solicitors who had recovered it, but the court of appeal refused, in the exercise of its discretion, to make the order under the circumstances of the case.

In *Watkins v. Watkins* (1896), Prob. Div. 222, it was held by the court of appeal that sums of money ordered to be paid by the husband for the maintenance of his divorced wife, after a divorce a vinculo, under authority of a statute which permitted the court to reduce the allowance fixed or discharge the order for maintenance, but not to increase the allowance, were so far analogous to the alimony of the ecclesiastical law that they should be treated as a purely personal allowance which could neither be alienated nor released so long as the order subsists. In the judgments delivered by the lords justices, no doubt was entertained that permanent alimony, which is under the control of the court, and can be either increased, decreased, or suspended at the discretion of the court, is, in its essence, inalienable.

In *Linton v. Linton* (1885), 15 Q. B. Div. 239, 54 L. J. Q. B. 529, 33 Week. Rep. 714, 2 Morr. 179, 49 J. P. 597, it was held in the court of appeal that future payments of alimony were not capable of being valued, and were not a "debt or liability" within the meaning of the bankruptcy act, and so could not be proven in the bankruptcy of the husband; and that, notwithstanding his bankruptcy, he was still liable to pay the alimony.

In *re Hawkins* (1894), 1 Q. B. 25, 10 R. 29, 69 L. T. 769, 42 Week. Rep. 202, 1 Mans. B. R. 6: It was held by the queen's bench ⁷⁵⁷ division that arrears of alimony which accrued after the date of a receiving order in bankruptcy, and before proof, were not provable in bankruptcy; and it was held by Vaughan Williams, J., that such arrears would not be provable whether they accrued before or after the date of the receiving order.

In *Kerr v. Kerr* (1897), 2 Q. B. 439, 66 L. J. Q. B. 838, 77 L. T. 29, 46 Week. Rep. 46, 4 Mans. 207, it was held that arrears

of alimony, which accrue before the making of a receiving order in bankruptcy against the husband, are not provable by the wife in bankruptcy. In this case, Vaughan Williams, J., said: "The practice of the divorce division so much treats the sums periodically payable under its order as a fund for maintenance and not as property, and so much keeps its hand on the obligation to make these periodical payments for maintenance, that it is a searching rule that the court will not, in the absence of special circumstances, make an order enforcing more than one year's arrears."

Not only does it follow, from the very nature of alimony, that it cannot be subjected in advance to a charge in favor of the solicitor through whose services it is awarded, but a like result follows from the plainest principles of public policy. According to the familiar practice of the court of chancery, the taxed costs and reasonable counsel fees of the wife are awarded against her husband. *Westcott v. Hinckley*, 46 N. J. L. 343, 29 Atl. 154, is an authority to the effect that there exists no legal liability upon the husband to pay such costs and counsel fees, and that they rest exclusively in the discretion of the chancellor. Applications for such allowances, as well as for alimony, peculiarly call for good faith and candor on the part of the applicant. It is a fraud on the court, and also upon the husband, for such an application to be based upon the supposed necessities of the wife, when in truth she has bartered away in advance a share of that which she is to receive. The present case furnishes a forcible illustration of the consequences that would flow from countenancing bargains made between the wife and her solicitor, with the design of appealing to the discretion of the chancellor for an allowance under the name of alimony, when in truth, perhaps, one-third or one-half of the entire amount (as in this case) is to be appropriated not to the ⁷⁵⁸ needs of the wife, but to the use of the solicitor. The chancellor here allowed a large sum for alimony, accrued between the date of the application and the final adjudication; he also allowed the usual taxed costs, and a counsel fee of one thousand dollars. Can it be supposed that he would have allowed this counsel fee had he known that one-third at least of the accrued alimony was to be diverted to the payment of "legal expenses?" Or, rather, would he not have "taken order" (to use the words of the statute) so as to insure that the alimony allowed should be devoted strictly to the purpose for which it was intended?

A case quite in point with the one now before us was that of *Jordan v. Westerman* (1886), 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826. There was a contract made between solicitors and client at the time the former were employed, whereby the client agreed that the solicitors should have one-half of whatever temporary or permanent alimony the court should require the defendant to pay, was held void. This decision is particularly apt as authority, because the statute law of Michigan respecting allowance of alimony pendente lite, and of permanent alimony as incidental to divorce, does not differ in any feature, essential to the present inquiry, from the law and practice governing alimony in this state. The contract was objected to on three grounds, viz.: (a) that the plaintiff as a married woman was incapable of making a contract; (b) that the subject matter was not capable of being assigned; (c) that the contract was void as against public policy. The court passed by the first of these without argument, and sustained both the other grounds of objection. The reasoning of the opinion is very able and instructive.

As we have reached the conclusion that Mr. Westervelt is not entitled to impose a lien upon the fund in question for the amount of his claim, it becomes unnecessary to consider those allegations of Mrs. Lynde's petition which relate to the power of attorney. For, whether he acquired possession of the fund fairly or not, in either case he is not entitled to retain possession of it for the purpose of enforcing his claim. It is not doubted that he has rendered services of much value to Mrs. Lynde. For these he should be paid a reasonable sum. He claims to have paid \$4,900 to Mr. Bruce and Messrs. Gayley & Fleming, the ~~750~~ counsel who were concerned in the litigation. It should be stated that the case shows no ground for any criticism upon these gentlemen, and none is intimated. But, so far as appears, the amount of their fees was fixed without the approval of Mrs. Lynde being either given or asked. Moreover, she denies having authorized their employment at her expense. Supposing Westervelt has paid them the \$4,900, as he claims, it remains to be determined, as between him and Mrs. Lynde, whether these fees are chargeable against her, and, if so, whether they are reasonable. Any sum she is chargeable with on that account should be taken into consideration in fixing the amount to be allowed to Westervelt for his services. In his affidavit he claims to have paid a large sum of money out of the fund in question to Mr. Ball, the New York lawyer, who introduced him to Mrs. Lynde.

This payment, if made, appears to have been entirely without warrant, and is not to be credited to Mr. Westervelt as a disbursement. The bill of \$2,513.21 will, of course, be the subject of inquiry. It was said upon the argument that Mrs. Lynde had, with Westervelt's consent, drawn the money upon the check for \$16,086.79, after erasing the words "in full," etc. If this is true, that amount will, of course, be credited to him.

The order appealed from should be reversed and a new order directed to be made requiring the respondent, James Westervelt, to pay forthwith into the hands of the clerk in chancery, or to such other custodian as the court of chancery may designate, the entire sum of \$38,500 above referred to, after deducting the amount of counsel fees actually paid by him to Mr. Bruce and to Messrs. Gayley & Fleming (not exceeding, in the aggregate, \$4,900), and deducting an amount not exceeding \$2,513.21 for other disbursements and taxed costs paid by Westervelt from the fund of \$38,500, or chargeable thereon, and after deducting also the amount of the \$16,086.79 check sent by him to Mrs. Lynde, if it appears that she has collected the money thereon. Upon the payment being made into court, the court of chancery should then proceed, in a summary way, to ascertain and determine what is reasonable compensation for Mr. Westervelt's professional services rendered in Mrs. Lynde's behalf in the litigation above referred to, and also to inquire into the reasonableness of the fees ⁷⁶⁰ paid to Mr. Bruce and Messrs. Gayley & Fleming, and whether these are properly chargeable to Mrs. Lynde; and also to inquire into the bill of \$2,513.21. From any amount found due to Mr. Westervelt there should be deducted the costs of the proceedings, including the costs of this appeal, and also such part, if any, of the \$4,900 and \$2,513.21 as the court may find to be properly chargeable against his compensation, or not properly chargeable to Mrs. Lynde; the balance, if any, of his compensation to be paid to him, and the residue of the fund to go to Mrs. Lynde. If, upon taking the account, the balance appears to be against Mr. Westervelt, he should, of course, be required to pay it.

Let the order appealed from be reversed, and the cause remitted to the court of chancery, to be there proceeded with in accordance with the views above expressed.

Alimony is an allowance for support and maintenance: *Romaine v. Chauncey*, 29 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826; *Adams v. Storey*, 135 Ill. 448, 25 Am. St. Rep. 392, 26 N. E. 582. See the monographic note to *Methvin v. Methvin*, 60 Am. Dec. 665-682, on

the nature and allowance of alimony. It has been held that a contract by a wife to pay her solicitors one-half of the alimony to be recovered by her in a suit for divorce, as compensation for their services in the suit, is void: *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; monographic note to *Shirk v. Nerble*, 83 Am. St. Rep. 177.

The Summary Jurisdiction of Courts over their attorneys is the subject of a monographic note to *Burns v. Allen*, 2 Am. St. Rep. 847-862. Such jurisdiction extends to any matter in which an attorney has been employed by reason of his professional character: *Anderson v. Bosworth*, 15 R. I. 443, 2 Am. St. Rep. 910, 8 Atl. 339.

7

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HUGHES v. PENNSYLVANIA RAILROAD COMPANY.

[202 Pa. St. 222, 51 Atl. 990.]

CARRIERS—Limitation of Liability—Conflict of Laws.—If a contract containing a stipulation limiting liability for negligence by a common carrier is made in one state, but with a view to its performance by transportation through or into one or more other states, it must be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. Such contract, though valid in the state where made, must be declared void in the state where the injury occurs, if contrary to the policy of the law of the latter state. (p. 717.)

CARRIERS—Limitation of Liability—Conflict of Laws—Interstate Commerce.—If a contract limiting the liability of a common carrier for loss or injury caused by negligence, though valid in the state where made, is void in the state where a loss occurs, and suit is brought, the court in the latter state may enter judgment for the full value of the property negligently lost, disregarding the terms of the contract, without in any way interfering with the legitimate exercise of interstate commerce. (p. 718.)

J. G. Johnson, E. J. Sellers and D. W. Sellers, for the appellant.

A. S. L. Shields, for the appellee.

225 POTTER, J. The plaintiffs in this case were the owners of a valuable horse which was shipped by their agent from Albany, New York, to Cynwyd, Pennsylvania. The contract for transportation was made in Albany with the New York Central Railroad, acting for itself and connecting carriers. The bill of lading provided that "no carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route." The horse was carried safely by the initial carrier to the end of its line, and delivered to the defendant company, by

whom it was brought to Philadelphia. At this point the horse was badly injured by the negligence of defendant's servants, and the injuries thus received are the foundation of this action. The defendant admitted liability, but claimed that the plaintiff was not entitled to recover in excess of one hundred dollars. In support of this claim, it relied upon a printed form of a shipping contract, which was signed by plaintiff's agent at the time of shipment, and retained by the carrier. This contract contained a stipulation that the liability of the initial carrier and any connecting carrier should be limited, in case of loss or damage to a horse or mule, whether through negligence or otherwise, to an amount not exceeding one hundred dollars each. At the trial the court below declined to charge the jury that such a limitation of the amount of the damages was lawful in this case. The jury, under the evidence, found a verdict for nine thousand nine hundred dollars—the full value of the horse.

The refusal of the court to charge that the contract of shipment, limiting the liability for negligence, was valid and binding upon the plaintiff, is here assigned as error. It is conceded that this contract is valid under the law of ²²⁶ New York, and that if the horse had been injured while in course of transportation through that state, the plaintiffs would have been limited to the sum of one hundred dollars. It is also conceded that such a contract, made in Pennsylvania, for transportation between points within the state, would be void as against the settled policy of this state. The question is not an open one with us. Nor does it matter whether the attempt be to limit the liability as in *Ruppel v. Allegheny Valley Ry. Co.*, 167 Pa. St. 166, 46 Am. St. Rep. 666, 31 Atl. 478; or to claim exemption entirely from liability as in *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674, 30 Atl. 948. But because the contract was made in New York, to be performed partly in New York and partly in Pennsylvania, it is contended that the law of New York should govern the case. It may be noted here that while the contract contains an acknowledgment that Grady had the option to ship the horse at a higher rate, with increased liability, yet, as a matter of fact, no such offer was made. The evidence shows that the freight agent at Albany did not know the amount of the charges, and the blanks for the amounts were not filled in. The case of *Burnett v. Pennsylvania R. Co.*, 176 Pa. St. 45, 34 Atl. 972, seems to be decisive of the question now before us. In that case the plaintiff was an employé of defendant at Trenton, New Jersey. He

applied for and obtained free transportation from Trenton to Elmira, New York. He received two passes—one, from Trenton to Philadelphia, which was not in evidence, and the other, an employé's trip pass, from Philadelphia to Elmira—by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pennsylvania, through the admitted negligence of the defendant's employés. It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff, in consideration of free transportation, assumed the risk of accident, was valid, and that in that state he could not recover; and it was conceded by the defendant that in Pennsylvania the decisions are otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. There, as in this case, the contract was valid in the state where made. The transportation was safely performed into this state, and the injury occurred within this state through the negligence of the carrier. It was held that the responsibility of the defendant was to be determined by the law of the ²²⁷ state where the contract was being performed, and where the negligence occurred, and recovery was allowed. In the present case the facts are more strongly against the defendant, in that it is not the initial carrier under the contract, and the stipulation upon the part of each carrier was against liability for damages not occurring on its portion of the through route. In *Fairchild v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 527, 24 Atl. 79, there was a contract for the transportation of a horse from Washington, District of Columbia, through Pennsylvania, to Harkimus, New Jersey. It was injured by the negligence of the defendant while in Baltimore, Maryland. The contract contained a stipulation limiting the value of the horse to one hundred dollars. Suit was brought to recover damages for the injury. The court below held the contract to be valid, and, under instructions, a verdict was rendered for one hundred and five dollars and fifty cents, and judgment entered thereon. This judgment was affirmed, this court saying, in a per curiam: "This written contract was made in the District of Columbia, and is to be interpreted by the *lex loci contractus*": *Forepaugh v. Delaware etc. R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503. If, however, in the performance of the contract, the horse had been carried into Pennsylvania, and it had been injured in this state, the principle set forth in *Burnett v. Railroad Co.*, 176 Pa. St. 45, 34 Atl. 972, would, no doubt, have been applied, and the limitation of liability held void. In the *Fairchild* case, nothing

is said about the law of Maryland, where the injury occurred, though, as a matter of fact, the limitation of liability was valid in that state, as appears in *Brehme v. Adams Express Co.*, 25 Md. 328. The *Fairchild* case, when properly understood, is authority only for the proposition that a contract containing a limitation of liability, made in a state where it is valid, will be enforced in this state, when an injury occurs in the course of transportation through a state where such a contract is not contrary to public policy. It is only an application of the doctrine of *Forepaugh v. Delaware etc. R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503, to a slightly differing state of facts. The reference to *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, could only have been to show the law of the District of Columbia; for in *Grogan v. Adams' Exp. Co.*, 114 Pa. St. 423, 60 Am. Rep. 360, 7 Atl. 134, this court expressly refused to follow the *Hart* case.

²⁰¹⁸ A distinction may well be made between contracts of a general nature, and those of common carriers of goods through several states. Much stress is laid in the brief of appellants upon the opinion of Justice Bradley in *Morgan v. New Orleans*, 2 Woods, 244, Fed. Cas. No. 9804. The contract in that case was made in New York, to be performed, in an important part, there, and in part by the building of a railroad in Louisiana. Another important part was to be performed in Alabama, and perhaps other important parts in other states. The court held that, where a contract is to be performed in several jurisdictions, there could be no presumption that the parties had in view the laws of each of these jurisdictions, as the law that was to govern the contract, and therefore held that it was governed by the law of New York, where it was made. But it will be noticed that the case did not involve the law of common carriers, but only a contract relating to a matter about which the parties were free to contract, and against which there was no public policy of any state. The inquiry was therefore properly confined to ascertaining the intention of the parties to the agreement. But a contract for the carriage of goods is not one as to which parties are entirely free to contract. Judge Sulzberger, in his charge in this case, aptly said: "There are, however, limitations upon the right of contract. There is a certain field of human activity over which the state assumes supreme control by virtue of its sovereignty, and when the state declares its policy, which we call 'public policy,' upon these questions, then the right of private contract is utterly abolished to that extent." It will not do, therefore, to apply

to the contracts of common carriers all the principles that may apply to other contracts. When courts declare a contract void as against public policy, they are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, ²²⁹ causing injury, occurs. If such a contract comes under construction in a state like Pennsylvania, whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in *Forepaugh v. Delaware etc. R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503, and in *Fairchild v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 527, 24 Atl. 79. But if the injury has taken place within its limits, it will declare the contract null and void, as in *Burnett v. Pennsylvania R. Co.*, 176 Pa. St. 45, 34 Atl. 972. In the *Fairchild* case, as the injury occurred in Maryland, this court enforced the law of that state. If the injury to the horse had been delayed until in the course of the journey it had reached Pennsylvania, our own law of public policy would have controlled. This principle is maintained in *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434. In that case the transportation was from Toledo, Ohio, to Concord, New Hampshire. The goods were lost on their passage through New York, and the court said that, if it is to "be executed partially in New York, we perceive no reason why, in respect to that part, the law of that state should not govern; and such is the doctrine laid down in *Story on Contracts*, section 655." To the same effect is *Railroad Co. v. Sheppard*, 56 Ohio St. 69, 60 Am. St. Rep. 732, 46 N. E. 61. This principle involves no greater difficulty, as to proof, than the attempt to recover under a limitation of liability. In either case, negligence is a fact to be proven as to time and place, as any other fact.

Careful consideration of the contract and of the evidence shows that the contract in this case was not entire, either as to the obligation of the carrier to transport, or of the shipper to pay the freight. The New York Central Railroad made no contract for itself beyond its own lines. It acted as agent only for the connecting carrier. It is the same as though each car-

rier had separately agreed to transport over its own line. And the freight charges were shown to be made up of two distinct sums; one being the amount from Albany to Jersey City, and the other from Jersey City to Cynwyd. No case has come under notice, directly deciding that such a contract is severable. But in *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228, the ruling is such as to indicate that, in the opinion of the court, the bill of lading issued in that case, covering lines of several carriers, was not an entire contract.

The third assignment of error suggests that the entry of ²³⁰ judgment is in conflict with the interstate commerce act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce.

Upon the case as a whole, there is nothing to show any bad faith upon the part of the shipper. He applied for the transportation of his horse upon a special car, and loaded him thereon, together with the traps and harness and a special attendant. There was no concealment, nor any misrepresentation as to value. The shipper paid the carrier the amount asked of him. It does not appear that any bargain was made in advance for a freight rate; nor was there any reason why the full rate, sufficient, in the opinion of the carrier, to cover the risk of transportation, should not have been charged and collected. The shipper should not be asked to pay for insurance against the negligence of the employes of the carrier. If protection of that nature was desired, the carrier was at liberty to procure it for itself, and its own expense. It must be assumed, also, that both shipper and carrier knew the law of Pennsylvania, and had it in view when the contract was made. The facts were submitted to the jury in a charge which clearly and correctly stated the public policy of this state with regard to the question under consideration.

The assignments of error are overruled, and the judgment is affirmed.

Mitchell and Brown, JJ., dissent.

The Principal Case was taken by writ of error to the supreme court of the United States where the judgment of the Pennsylvania court was affirmed. The case is reported under the title of Pennsylvania R. R. Co. v. Hughes in 191 U. S. 477, 24 Sup. Ct. Rep. 132, and the opinion as delivered by Mr. Justice Day is as follows:

“The right to review the judgment of the supreme court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the federal constitution or statutes which was denied to the plaintiff in error by the adverse holding of the state court.

“Upon the trial in the common pleas court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of one hundred dollars. The court refused to so charge, but holding that the policy and law of Pennsylvania, as declared by her courts of last resort, did not permit such limitations on the liability of common carriers, left to the jury to determine the value of the horse, and the question of the negligence of the defendant.

“In view of being carried to the supreme court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

“ ‘1. That it was lawful in the state of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this state, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which state it was partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

“ ‘2. That the plaintiff is not entitled to recover in excess of one hundred dollars.’

“Neither of these assignments of error presents a federal question in such sense as to give this court jurisdiction to review the judgment of the state court under section 709 of the Revised Statutes of the United States: U. S. Comp. Stats. 1901, p. 575. Nothing is better settled in federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege, or immunity under the federal constitution or laws set up and denied in the state courts: *Beals v. Cone*, 188 U. S. 184, 23 Sup. Ct. Rep. 275.

“The first error assigned in the common pleas court raised the question as to the law of the contract. It does not assert that any federal right was invaded or denied. It seems to have been conceded at the trial that the law of the state of New York, where the contract was made, permitted the making of a contract limiting the

liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States (*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151), wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations. But this is not a question of federal law wherein the decision of the highest federal tribunal is of conclusive authority. In *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523, 60 Am. Rep. 360, 7 Atl. 134, the supreme court of Pennsylvania expressly declined to follow the rule laid down in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the *Hart* case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal supreme court where some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied: *Bethell v. Demaret*, 10 Wall. 537; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. 666, 20 L. ed. 759; *New York etc. Ins. Co. v. Hendren*, 92 U. S. 287; *United States v. Thompson*, 93 U. S. 586.

“In the supreme court of Pennsylvania a further assignment of error was made as follows:

“ ‘3. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled “An act to regulate commerce.” Section 1 of said act clearly provides that where the transportation is from one state to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the state in which it may be performed, or in conflict with the policy of the United States as laid down in the federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the federal courts, the judgment should have been for the valuation mentioned in the contract.’ ”

"Of this assignment of error, Mr. Justice Potter, delivering the opinion of the supreme court of Pennsylvania, said:

" 'The third assignment of error suggests that the entry of judgment is in conflict with the interstate commerce act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application in this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce.'

" 'Upon the authority of *Missouri etc. R. Co. v. Elliott*, 184 U. S. 533, 22 Sup. Ct. Rep. 446, it may be admitted that the question of the decision of the state court being in contravention of the legislation of Congress to regulate interstate commerce was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stats. at Large, 379, c. 104; U. S. Comp. Stats. 1901, p. 3154) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the interstate commerce commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and pro-

viding that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

“While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

“It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

“In *Missouri etc. R. Co. v. Haber*, 169 U. S. 614-635, 18 Sup. Ct. Rep. 488, 496, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:

“‘These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject does not directly interfere with rights secured by the constitution of the United States or by some valid act of Congress, must be respected until Congress convenes.’

“In the absence of congressional legislation upon the subject, an act of the legislature of Alabama, to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose, was sustained in *Smith v. Alabama*, 124 U. S. 465, 1 Int. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

“An enumeration of the instances in which this court has sustained the validity of local laws intended to promote the safety and comfort of passengers, employes, persons crossing railroad tracks, and adjacent property owners, is given in the opinion by Mr. Justice Brown, in *Cleveland etc. R. Co. v. Illinois*, 177 U. S. 514-516, 20 Sup. Ct. Rep. 722.

“The case of *Chicago etc. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. Rep. 289 is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded

at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: 'That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount not exceeding the sum of five hundred dollars.' The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: 'No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into': Iowa Code 1879, sec. 1308. The trial court charged that the limitation contained in the contract was void, and a verdict of one thousand dollars damages was returned. A judgment on the verdict was affirmed in the supreme court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said:

“ ‘A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. . . . The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the per-

sons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods.'

'It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

'We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

'The judgment of the supreme court of Pennsylvania is affirmed.'

Contracts Limiting the Liability of Carriers are discussed in the monographic note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74-134. Conflict of law as affecting such contracts is considered on pages 125-129 of this note.

BUCHANAN v. PIERIE.

[205 Pa. St. 123, 54 Atl. 583.]

WILLS—Insane Delusions.—To justify the setting aside of a will on the ground that the testator was possessed of an insane delusion, it must be shown, not merely that he was the victim of such delusion, but also that he was controlled by it in the making of his will, and was led by it to improperly disregard his natural heirs. (p. 727.)

WILLS—Believers in Spiritualism, when testamentary capacity is in question, must be considered in the same light as those who share in any other religious belief. (p. 727.)

WILLS—Spiritualism as Avoiding.—The will of one who believes in spiritualism is not, on that account alone, void; nor is it evidence of mental unsoundness. It must be shown, in order to avoid a will on that account, that it was the offspring of such belief. (p. 728.)

WILLS—Spiritualism as Avoiding.—A mere belief of the testator that he could, through mediums, communicate with the spirits of the dead, is not sufficient to avoid his will, without proof that he believed or admitted that he was influenced in any way by spirits in making his will, especially when he has amply provided therein for his natural living heirs. (p. 730.)

J. G. Gordon and W. H. R. Lukens, for the appellant.

J. G. Johnson, for the appellee.

124 POTTER, J. The will which is brought before us by the record in this case does not bear upon its face any indication that it is the product of an unbalanced mind. Upon the contrary, it shows **125** throughout the impress of a rational mind possessed of clear and definite knowledge of the character and extent of the estate, and of the persons upon whom it is bestowed. In its various provisions, nothing appears which offends the reason or shocks the moral sense. It speaks rather in terms of thoughtful and considerate kindness. In the bequest to his daughter, the testator carefully provides for her a home so long as she lives, and an annual income, payable in equal monthly payments; and, with rather minute attention to the details of her comfort, directs that in addition she shall be supplied with eight tons of coal annually, to be procured for her by his executors in the month of August of each year. He also provides that his burial lot in the cemetery shall be kept and used for the interment of himself and his daughter and her children. It is apparent from an inspection of the will that the testator was not unmindful of his parental rela-

tion, but that he made thoughtful and detailed provision for his daughter's welfare during her lifetime. In the same spirit, he provided a home and an annual income for the term of her life for his faithful servant and housekeeper, Mrs. Laubach, who had ministered to him for many years.

After thus providing for his daughter and for his housekeeper during their lives, he gives his entire estate to the First Association of Spiritualists of Philadelphia, to be applied to the purchase of a lot, and the erection of a building thereon, to be known as McIlroy Hall. In the event of the failure of the trustees of the association to act in this direction within three years after receiving the whole of his residuary estate, then the proceeds are to be applied to the establishment of a home for white Protestant orphan children, to be called the McIlroy Institute.

The First Association of Spiritualists of Philadelphia thus referred to, is a corporation of Pennsylvania, duly incorporated by the court of common pleas of Philadelphia county. It appears from the evidence that the testator, Alexander McIlroy, executed this will upon July 20, 1880. He did not die until May 27, 1897, nearly seventeen years afterward, having in the meantime added five codicils, the last of which was made upon March 11, 1897. By it he ratified the will and the second and third codicils thereof.

¹²⁶ The will and its several codicils were duly admitted to probate by the register of wills, but at the instance of Martha Buchanan, the only daughter of the testator, an appeal was taken to the orphans' court, and an issue was thereafter awarded and sent to the common pleas for trial wherein Martha Buchanan was plaintiff, and the executors and the remaining legatees under the will were defendants.

The issue as framed involved an inquiry into the question of the general sanity of the testator, and also as to the exertion of undue influence in the making of the will, upon the part of certain persons called spiritualists.

But no evidence was offered which tended to show that any undue influence was exercised upon the testator by any living person, and this portion of the inquiry was therefore narrowed to what was incidental to the allegation of mental incapacity.

This, it was contended, existed as the result of a delusion under which the testator rested, with regard to his daughter and her sons, which influenced him, and prejudiced him against them in the making of his will. There was no testimony which

questioned the general sanity of the testator, or which showed any lack of ability upon his part to conduct in an entirely rational and proper manner the ordinary transactions of life.

In order to justify the setting aside of the will, upon the grounds submitted, there must be evidence, not merely that the testator was the victim of a delusion, but that he was controlled by the delusion in the making of his will, and was led by it to improperly disregard his daughter and her sons. Does the record show that there was any such evidence in this case? The estate seems to have been modest in amount, and the provision made by the testator for the comfort of his daughter and his housekeeper during their lives would apparently consume a large portion of the income.

The contestant does not, however, regard with disfavor these provisions of the will, nor does she seem to consider them as instigated by an insane delusion. It is the failure of the testator to give her the entire estate in fee which she testifies is, in her opinion, proof of his partial insanity.

This court in *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679, 30 Atl. 1053, after citing authorities defining partial insanity, and discussing their application, said: "The question in any given case is therefore ¹²⁷ whether the act under investigation, was done upon consideration of existing facts, or under the influence of a delusion that controlled the will of the doer and destroyed his freedom of action."

In the present case, the question is whether Alexander McIlroy was, at the time he made his will, subject to a delusion, amounting to partial insanity, which controlled him and prevented the free exercise of his judgment, it being alleged that the particular delusion to which he was subject was an unfounded distrust of his daughter, and a feeling of ill-will against her and her sons.

Unquestionably he was a believer in spiritualism. But there is abundance of authority for the proposition that mere belief in spiritualism, ghosts, dreams, etc., is not proof of insanity. There are many cases holding that without proof that such a belief resulted in some insane delusion which prompted the act sought to be set aside, the act is valid, however extreme or unreasonable the faith in spiritualism or other like beliefs.

In *Matter of Halbert*, 15 Misc. Rep. (N. Y.) 308, 37 N. Y. Supp. 757, Surrogate Collier says: "Some evidence was given in reference to the religious belief of decedent. For many years

she had been a spiritualist, and had done many things consistent with the teachings of spiritualism. She visited the cemetery, and communed with the spirits of her deceased husbands; set apart a bedroom for them in order that they might have a place to rest when they visited her; placed at the table a sufficient number of plates for them, and did numerous other things attributable, from this evidence, to her belief.

"We are not to treat spiritualism theologically, but legally, in its application to the testamentary capacity of the testatrix. It matters not what our individual opinion may be as to the facts, formalities or claims of spiritualism; that has nothing to do with this case. There is no evidence that decedent did things other than those which are understood to be the result of the teachings of spiritualism. There was no delusion which was the result of her belief which entered into the execution or preparation of this instrument. It is well settled that believers in this faith, when testamentary capacity is in question, must be considered in the same light as those who take part in any other religious ceremony."

¹²⁸ In *Matter of Rohe*, 22 Misc. Rep. (N. Y.) 415, 50 N. Y. Supp. 392, says Surrogate Marcus, on page 418, 22 Misc. Rep., and on page 394, 50 N. Y. Supp.: "The testimony offered by the contestants relating to the spiritualistic séances, when closely analyzed, seems to show nothing but the fact that the testatrix was a believer in spiritism. There is an entire absence of testimony as to the influence of spiritualism upon the particular disposition of her property as made by her. It must be conceded that the evidence proves conclusively that the testatrix was a believer in spiritism, but it in no way shows that her visits amongst the people with whom she came in contact at the time the séances were held, or the messages received by her from interested or disinterested persons, effected by the same belief, in any way induced her to make any disposition of her property in any particular or specified way, or in any way. It may be that some influence, by means of these séances, was obtained over her, but by whom, and to what purpose, is not shown. It may be that all these spiritualistic séances and messages were a scheme of deception and fraud, but there is no proof in the case which ought to support a judgment that such was a fact. . . . The will of one who believes in spiritism is not on that account void, nor is it evidence of mental unsoundness. It must be shown, in order to void a will on that account, that it was the offspring of such belief."

To the same effect is *Keeler v. Keeler*, 20 N. Y. St. Rep. 439, 3 N. Y. Supp. 629, and the cases are well summed up in *Middle-ditch v. Williams*, 40 N. J. Eq. 726, 17 Atl. 826, where the vice-ordinary says (page 735, 45 N. J. Eq., page 830, 17 Atl.): "The testator's belief in spiritualism was not a morbid fancy, arising spontaneously in his mind, but a conviction produced by evidence. The proofs show that when he first commenced attending what are called séances, he was inclined to be skeptical; afterward his mind seemed to be in an unstable condition; he sometimes believed and at others doubted, and that it was not until the spirits gave an extraordinary exposition of their power, . . . that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice-Chancellor Gifford in *Lyon v. Home*, L. R. 6 Eq. 655, 682, when he called them 'mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish and the superstitious; and on the other, ¹²⁹ to assist the projects of the needy and of the adventurer,' still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in spiritualism is not insanity. The court, in *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473, said: 'Belief in spiritualism is not insanity, nor an insane delusion. . . . The term "delusion" as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist.' And in *Brown v. Ward*, 53 Md. 376, 393, 36 Am. Rep. 422, it was said: 'The court cannot say, as a matter of law, that a person is insane because he holds the belief that he can communicate with spirits (of the dead), and can be and is advised and directed by them in his business transactions and the disposition of his property.' Subsequently the same view was expressed in *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578, and also in *Matter of Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665. The utmost length to which any court has yet gone on this subject is to declare that a belief in spiritualism may justify the setting aside of a will when it is shown that the testator, through fear, dread, or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and, in disposing of his property, followed implic-

itly the directions which he believed the spirits gave him, but, in such case, the will is set aside, not on the ground of insanity, but of undue influence."

Turning again to the present case, we find from the testimony that, while the testator held firmly to the conviction that he could, through mediums, communicate with the spirits of the departed, and particularly with the spirit of his dead son, yet it does not appear that he believed or ever admitted that he was influenced in any way by the spirits in the preparation of his will. Neither at the time when the will was executed in 1880, nor when the various codicils were added from time to time, during a period of seventeen years thereafter, was there evidence that he claimed or admitted that he was guided or controlled by the advice or suggestion of his spirit friends in the disposition of his estate.

¹³⁰ But while it is not urged upon behalf of the contestant that there is any direct evidence that any provision of the will was inserted at the instance of anyone known as a spiritualist, or by reason of any communication to the testator from the spirit world, yet it is strongly urged that through his faith in the reality of such communications, and his daughter's contempt for any such belief, which excited his anger, the testator became imbued with an insane delusion concerning his daughter and her sons, which prejudiced him against them. But in so far as any such ill-will existed, it can be accounted for upon perfectly natural grounds. The daughter admits frequent disagreements with her father upon the subject of spiritualism and says that she did not hesitate to express her contempt for his belief, and that she sought to convince him of his credulity. Few parents are willing to meekly accept reproof and admonition from a son or daughter. But whatever these differences of opinion may have been they were not very serious, for the testator continued to show the genuineness of his affection, in a most practical way, by providing a house for his daughter and her family to live in, and contributing for many years to their support.

The testimony does show that he was at times suspicious and irritable, and was subject to infirmities of temper. But the same may be said of many men who are not to be charged with partial insanity. In her evidence, Mrs. Buchanan passes in review some thirty years of the life of her father. She recalls and recites a number of instances of queer and whimsical conduct on his part, during that long period of time. Told connectedly, and massed together, their effect is greatly heightened.

But if it be remembered that in point of fact they were isolated instances, distributed through long years of a life indisputably sane and normal in its everyday aspects, they lose much of their force. Many of them occurred years before the will was made. None of them are connected with its execution, and during all the time in which the contestant alleges that there was a display of ill-feeling upon the part of her father toward herself and her sons, she was being sheltered in the home which he had provided for her and her children, and was being supported by his bounty. She testifies that for years he gave her an allowance of fifty dollars per month. And this out of ¹³¹ the modest pay of a night watchman. With advancing years and increasing feebleness, and the loss of his own position, he was unable to maintain this allowance to her. But the terms of his will and the careful provision he there made for her are in total disaffirmance of the idea that he was under any delusion which induced any feeling of unkindness or ill-will toward her.

He had provided for her during the years while her children were growing up, and when he made his will she was a woman in middle life, with a family of grown-up sons and a daughter. Surely the testator may be pardoned if under these circumstances he felt that he had done his paternal duty. Nor is there occasion for wonder if after making further reasonable provision in his will for this same daughter and for his faithful housekeeper, he felt at liberty to indulge a desire to perpetuate his name through a bequest for the benefit of a belief, from whose teachings, however mistaken he may have been, he undoubtedly felt that he had received much comfort and consolation.

We find no ground for the assumption that the daughter was entitled to the whole of her father's estate in fee, and that his failure to give it to her was caused by an insane delusion, which made her the object of his ill-will.

While the various assignments of error to the charge of the court may not be specifically sustained, yet a careful consideration of the evidence has satisfied us that as a whole it falls short of sustaining the allegations, either of testamentary incapacity or undue influence.

We think that under all the evidence in the case, the defendants were entitled to binding instructions in their favor. The tenth assignment of error is therefore sustained, the judgment is reversed, and the issue is directed to be set aside. The costs to be paid by the appellee.

Testamentary Capacity is not destroyed merely by a belief in spiritualism: *Orchardson v. Casfield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197. See the discussion of this question in the monographic note to *People v. Hubert*, 63 Am. St. Rep. 91-94. Although a person has insane delusions, his will must be treated as valid, unless in some way connected with such delusions: See the monographic note to *People v. Hubert*, 63 Am. St. Rep. 96. The will must be shown to be a result of the delusions, to justify setting it aside: *Hemingway's Estate*, 195 Pa. St. 291, 78 Am. St. Rep. 815, 45 Atl. 726.

EVANS v. PHILADELPHIA.

[205 Pa. St. 193, 54 Atl. 775.]

MUNICIPAL CORPORATIONS — Negligence — Dangerous Streets.—If a city negligently allows a public street to remain in a dangerous condition, it must respond in damages to a property owner who ventures thereon in search of recreation or when called to do so by duty, and is injured through such danger while exercising ordinary care. (p. 734.)

J. H. Young, for the appellants.

R. Brannan and J. K. Kinsey, for the appellee.

¹⁹⁴ BROWN, J. Sarah E. Evans, the plaintiff below, lived at 406 Dickinson street, in the city of Philadelphia. At the southwest corner of that street and Fourth there was a grocery store, and, between it and the home of plaintiff, an alley ran north and south, in which there was a drain carrying off water from the properties fronting on Fourth street. On February 22, 1901, the day the plaintiff fell and was injured, and for some time previous, this drain had been clogged with ice, which extended out over the sidewalk on the south side of Dickinson street and out into the street as far as the car tracks. A ridge of ice extended from the building line to the curb and from the curb to the car tracks. About 4 o'clock in the afternoon the plaintiff went from her home to the grocery store, passing safely over the ice on the pavement; but, on her return, she slipped and fell, sustaining the injuries for which she is now seeking compensation. There was ample evidence of the city's negligence in allowing the sidewalk to remain in its dangerous condition; and, in directing a judgment of nonsuit, the learned trial judge, though not assigning any reason for doing so or for refusing to take it off—as is too frequently the case with some

courts—manifestly regarded the plaintiff as guilty of contributory negligence. Questions which he asked indicate that he felt there was a safer way of going to and returning from the store, which the plaintiff ought to have taken; but, even if there was such way, it is clear, from the testimony of the four witnesses called, that it was for the jury, and not for the court, to pass upon the plaintiff's negligence.

The danger was manifest, and it was the duty of the plaintiff to have avoided it, if she could have done so by the exercise of proper care under the circumstances, which would have been to take a safe way to the store, if one existed. If she could have avoided the danger on the pavement by going out into the street beyond the car tracks, or even crossing over to the other side and then recrossing to the store, it was her duty to do so: *City of Erie v. Magill*, 101 Pa. St. 616, 47 Am. Rep. 739; *Fleming v. City* ¹⁹⁵ of Lock Haven, 15 Week. Not. Cas. 216; but no matter where she turned, there was no safe path for her. Ice was around and about her on every side, and, though the danger might have differed in degree, she was bound to encounter the same kind, wherever she turned. Whether she went directly to the store or crossed over to the other side of the street, or even went around a square through Greenwich street, which was south of and parallel to Dickinson street, she could not have reached the store without passing over ice and without encountering the same danger that was before her on the sidewalk. From her testimony we extract the following: "Q. Mrs. Evans supposing you had gone out on the street in order to avoid the ice at the alley, and gone in the car track, could you have gotten to the store at Fourth and Dickinson without going over ice? A. No, sir. Q. Could you have gone around up Dickinson and down Fifth and around Greenwich? A. I would have had to go over ice to get around there. Q. If you had gone up Dickinson to Fifth and to Tasker would you have gone over ice? A. Yes, sir. . . . Q. Where was that ice? A. All right around the store; right around the curb before you come to the store. Q. Around the curb where? A. Right near the store. Q. At the corner of Fourth and Dickinson? A. Yes, sir. . . . Q. Now, then, what was the condition of Dickinson street on the north side, where you say there was only snow, I mean going down over the crossing of Fourth street on the north side of Dickinson? A. There was ice all along there at that time. Q. Ice where? A. All along on Fourth street. Q. Was the crossing at Fourth

street covered with ice? A. Yes, sir. . . . Q. There was no possible way for you to have gone around on the north side of Dickinson street, crossing Fourth and going to that store, without going over ice? A. No, sir; not without going over ice. Q. Was there a continuous lot of ice from the time it left that alley, where the accident occurred, extending over the payment down to the gutter and down to Fourth and down to Greenwich? A. Yes, sir." Harry F. Wilgus testified as follows: "If she had gone out in the street from her house on Dickinson street, and avoided the ice which went to the car track, and gone around and tried to reach your store by any means, could she have done so without going over ice equally as dangerous? A. No, sir. Q. She would have ¹⁹⁶ had to cross over ice? A. She could not go there without crossing ice, no matter what direction she would go. Q. She would have crossed ice equally dangerous? A. Yes, sir. . . . Q. What was the condition of the crossing leading over Fourth street from your store to the east side of Fourth street? A. There was ice around there, too; there was ice there down to Greenwich on that gutter." Ida M. Bowen was asked: "Q. If Mrs. Evans had gone out in the street from her house and had gone onto the other side, as you have heard described there was snow at that time, could she have regained the sidewalk at Fourth and Dickinson without passing over ice which was equally dangerous? A. I hardly think so." And the same witness further testified: "Q. There was no way of getting from her house to the grocery store at Fourth street unless she went a square out of her way, and then, you think, she would meet the same conditions? A. Yes, sir." There is nothing in the testimony of Frederick J. Rudlinger, the last witness called by the plaintiff, to show that, on the day of the accident, there was a safe route that she might have taken; for even he admits she would have encountered ice in taking any other route, though, perhaps, not in the same quantity or so slippery as at the alley.

To relieve herself from the imputation of contributory negligence, the plaintiff was not required, with danger around her on all sides, to select from all the dangerous paths the one which she ought to have known was the least so. Nothing more was required of her than ordinary care, and whether she had exercised it, under the circumstances, by going over the pavement from the store to her home, instead of by some other route, on which there was the same danger, differing only in degree was for the jury. Nor was she bound to remain in

her house because the city, by its negligence, had made it dangerous for her to go out on the street in search of recreation and pleasure or when called to do so by duty. "It is not the law that a resident in a city must remain continuously on his property, when the city grossly neglects the repair of its streets, under pain that if he ventures on the streets or walks and suffers injury resulting from the city's default, he can recover nothing": *City of Altoona v. Lotz*, 114 Pa. St. 238, 60 Am. Rep. 346, 7 Atl. 340. In this case the plaintiff, as the housewife, went to her grocer for ¹⁹⁷ provisions for her family, and, under the testimony to which attention has been called, the court could not, as a matter of law, have pronounced her negligent for having kept to the pavement.

Judgment reversed and *procedendo* awarded.

A City is Under an Absolute Duty to keep its streets in a reasonably safe condition for public travel, though it is not an insurer against injury to travelers: *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892, and cases cited in the cross-reference note thereto; *Deming v. Terminal Ry.*, 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983. But see *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280. As to the liability of a city for allowing ice to accumulate on its streets and sidewalks, see *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317, and cases cited in the cross-reference note thereto; *Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478, 89 N. W. 280.

SHATTUCK v. AMERICAN CEMENT COMPANY.

[205 Pa. St. 197, 54 Atl. 785.]

CORPORATIONS—Transfer of Stock—Power in Blank.—A certificate of stock in a corporation with a power of attorney to transfer, duly executed but in blank as to the date and name of the transferee, is in the position of merchandise prepared for market. The presumable intent of executing such power, is to put the holder in position to complete a sale by delivery of the certificate and transfer of the stock. Such transfer carries, *prima facie*, a good title. (pp. 738, 739.)

CORPORATIONS—Transfers of Stock—Blank Power.—The business of a stock broker is to buy and sell corporate stock, and when a certificate of stock and power in blank to transfer are put into a broker's hands, the situation is exactly analogous to that of any merchandise prepared for market, and his transfer thereof vests, *prima facie*, a good title in the transferee. (p. 739.)

CORPORATIONS—Transfers of Stock—Good Faith Purchasers.—The rights of a bona fide holder of stock in a corporation, as against the true owner thereof, to whom the apparent owner has

either sold or pledged such stock, do not depend on the negotiable character of the certificates of stock, but, on the principle that one who has conferred upon another by written transfer all the indicia of ownership, is estopped to assert title, as against a third person, who has in good faith purchased the property for value from the apparent owner. (pp. 739, 740.)

CORPORATIONS—Transfer of Stock in Blank—Bona Fide Holders.—If the owner of corporate stock voluntarily gives certificates thereof with blank assignment and power to transfer to his broker, who betrays the confidence reposed in him, such owner must suffer the loss rather than an innocent stranger whose money the broker is thereby enabled to obtain. This rule applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor, and if the pledgee pledges it to secure payment of his own debt, the second pledgee may hold it as security until his debt is paid. (p. 740.)

CORPORATIONS—Stock—Blank Power to Transfer—Holder for Value.—A certificate of corporate stock accompanied by an irrevocable power of attorney to transfer, either filled up or in blank, is, in the hands of a third person, presumptive evidence of ownership in the holder, and if the person in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. (p. 741.)

EQUITY.—If One of Two Persons, Who are Equally Innocent of Actual Fraud, must lose, the one whose misplaced confidence in his agent or attorney has been the cause of the loss, cannot throw it upon another, but must stand it himself. (p. 742.)

R. C. Dale, H. C. Boyer and S. Dickson, for the appellant.

E. O. Michener and J. G. Johnson, for the appellee.

204 BROWN, J. It seems to be useless for us to call the attention of some of the lower courts to the propriety of an opinion containing the **205** reasons for entering a judgment where reasons manifestly ought to be given. In the present case reasons for the judgment entered certainly ought to have been given, and it is to be regretted that the learned court withheld them.

When the appellee purchased the stock from Jamison Brothers & Co., they handed to him proper certificates, with an assignment and power of attorney on the back of each, signed by them in blank. They parted with all their interest in the stock, and, when they delivered the certificates to their vendee with their signatures to the blank assignments and powers of attorney, they gave authority to him to insert his own or any other name as the transferee of the stock and to designate any one as the attorney to make the formal transfers on the books of the American Cement Company. That the stock was transferable only on the books of the company by Jamison Brothers & Co., to whom the certificates had been originally issued, was

a condition inserted in the certificates only for the convenience and protection of the corporation itself: *Commonwealth v. Watmough*, 6 Whart. 117; and in no manner affected the title of Shattuck, which was absolute upon the delivery of the certificates to him. There was nothing either on the face or back of any one of them to indicate that they belonged to him. The evidence of the ownership of the stock, as gathered from each certificate, was that it had been originally issued to Jamison Brothers & Co.; that, for a valuable consideration, they had sold it to an unnamed vendee, and that whoever might have possession of the certificates as the purchaser directly from the firm, or through someone to whom they had sold and delivered them in the first instance, should be regarded and dealt with as their owner. The evidence of Shattuck's title was not a transfer to him, but was his possession of the certificates, which it is to be fairly presumed were handed to him by the brokers from whom he had purchased, with the transfers in blank, because he had so requested for his own convenience, if he should wish to dispose of them to others, without going through the formality of transfers upon the books of the company. Instead of having himself named as transferee, he saw fit to take the certificates in the shape in which they are usually handed over to purchasers from brokers, knowing that his possession of them ²⁰⁸ would be regarded as the evidence of his title and his authority to insert proper names in the blank transfers and blank powers of attorney. Upon presentation of them to the company by himself or other acquiring title through him, he or they, at any time, could have demanded and would have received new certificates in their own names. If he had sold his stock to another, nothing more would have been required of him than a mere delivery of the certificates to the vendee, and so they could have passed from hand to hand, each succeeding vendee having implied authority from Jamison Brothers & Co., the original holders, to fill up the blanks, though there was no necessity either in law or according to the usages of trade to do so, until some purchaser wished to keep them as a permanent investment or feared to allow them to remain in a condition which might cause serious consequences if they should get into hands for which they were not intended. With the certificates in this shape, Shattuck intrusted them to the safe-keeping of his brokers, and the question is whether he shall suffer the consequences of their bad faith to him, or the same shall fall upon another who acted in good faith with the brokers

as the holders of the certificates, possessing, according to the usages of trade, the indicia of ownership of the stock.

The appellee could have absolutely protected himself from the loss which has befallen him through the perfidy of Stahl by having had his name inserted as the transferee of the stock; but he did not do so. He followed one of the well-settled usages of the financial world by taking a blank transfer of the stock which, with the delivery of the certificates to him, was all he needed for the purpose of acquiring the absolute title to the securities. As a rule, stocks are so sold and bought in this busy age, and pass from seller or buyer, quasi negotiable. Occasionally, real owners of certificates of stock so transferred to them in blank may be, as in this case, the victims of those to whom they are intrusted in confidence that there will be no abuse of the indicia of ownership; but, notwithstanding such abuse, those who sell and buy stocks in financial communities will continue to sell and buy them as they were sold and bought here. The convenience and necessities of commercial centers will always require such a usage.

With full faith in the integrity of Stahl & Straub, bankers ²⁰⁷ and brokers, with whom the plaintiff below had been in the habit of transacting business, he left his certificates of stock with them for safekeeping. He had been not only their customer, but had acted as their attorney, and there was nothing to lead him to think that the certificates would not be returned to him whenever he should call for them. Instead of keeping them safely, Stahl took them from the envelope in which they had been placed and pledged them to the Corn Exchange National Bank, which, in good faith, made a loan to him in the name of Stahl & Straub, and the only question is whether this bank, which has indemnified the American Cement Company, or the appellee, shall bear the loss caused by the bad faith of Stahl. Upon principle and authority, the question can hardly be regarded as an open one.

As applicable to the facts in this case, we adopt the language of our Brother Mitchell in his dissenting opinion in *Ryman v. Gerlach*, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302, which is in harmony with the view entertained by the majority of the court: "A certificate of stock with a power of attorney to transfer, duly executed but in blank as to date and name of transferee, is in the position of merchandise prepared for market. That is the way sales and transfers of stock are usually made, and the presumable intent of executing the power to transfer

is to put the holder in position to complete a sale by delivery of the certificate and transfer of the stock. Such transfer carries prima facie a good title. The business of a stockbroker is to buy and sell stock, and when a certificate and power to transfer are put into a broker's hands the situation is exactly analogous to that of goods or merchandise of any kind, prepared for market, and put into the hands of a dealer in that particular article. The presumption which would arise in the case of an ordinary agent or holder is reinforced by the nature of this particular agent's business."

When the certificates of stock, with the transfers in blank indorsed upon them, were placed in the hands of Stahl & Straub by Shattuck, he acted innocently and in good faith; but another, equally innocent, dealt with one of the men to whom he had intrusted his stock with all the indicia of ownership; and if one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer ²⁰⁸ must suffer for the consequences of the wrongdoing: *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. 248; *Burton's Appeal*, 93 Pa. St. 214; *Ryman v. Gerlach*, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302; *Goodwin v. Robarts*, L. R. 1 App. Cas. 476. There was nothing to indicate to the Corn Exchange National Bank that Stahl & Straub were not the owners of the certificates. They presented them in the regular course of business to the bank, for the purpose of procuring money upon them, and there was nothing to put the bank on inquiry as to the right, title or interest of the plaintiff below, or anyone else, in the shares of stock. The bank took them in good faith, and its title to them cannot now be impeached by the unfortunate appellee. "The rights of a bona fide holder, as against the true owner of the stock, to whom the apparent owner has either sold or pledged, do not depend on a negotiable character in the certificates, but rest on another principle; namely, that one who has conferred upon another by a written transfer all the indicia of ownership of property is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner." As a general rule, the vendor or pledgor can convey no greater right of title than he has. Simply intrusting the possession of a chattel to another as a depositary, pledgee or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person so

intrusted. The mere possession of chattels, without evidence of property or authority to sell from the owner, will not enable the possessor to give good title. But if the owner intrusts to another the possession of property, and also written evidence of title and power of disposition over it, as respects innocent third persons, he is deemed as intending it shall be disposed of at the pleasure of the depository. If there be conditions on which this apparent right of control is to be exercised, not expressed on the face of the instrument, the case, in principle, is like that of an agent who receives secret instructions qualifying or restricting an apparent absolute power. If the owner of the stock voluntarily gives certificates with blank assignment and power to make transfers, to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers whose money the brokers were thereby enabled to obtain. The principle applies ²⁰⁹ to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security till his debt be paid. 'A person loaning money on such certificate and power, has a right to believe that the borrower from whom he receives them has an absolute right to pledge the stock.' By commercial usage, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached: *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Pratt v. Tilt*, 28 N. J. Eq. 479; *Bridgeport Bank v. New York etc. R. R. Co.*, 30 Conn. 275; *Mount Holly etc. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117"; *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694.

We need not pursue this discussion further than to say that *Pennsylvania Railroad Company's Appeal*, 86 Pa. St. 80, is conclusive that the judgment below should have been in favor of the defendant. In that case, Samuel P. Fearon, in 1860, pledged certain shares of stock as collateral security for a loan, transferring the certificates in blank. At the maturity of the loan he paid the debt, and the shares were returned to him, but the blank transfers and powers of attorney as executed were never canceled. Five or six years after his death his executrix

took the certificates of stock and deposited them for safekeeping with her lawyer, a member of the bar in good standing. Creeley, the lawyer to whom they had been intrusted, used them to secure a personal loan, and Shultz, to whom he delivered the certificates of stock, had the same transferred to himself on the books of the company. On a bill to require the Pennsylvania Railroad Company to issue to the executrix of Samuel P. Fearon duplicate originals of the certificates of stock so transferred to Shultz, the court below directed a decree in favor of the plaintiff. In reversing that decree, while attention was called to the negligence of the railroad company, we said: "But there certainly was negligence on the part of the appellee. As executrix she placed the certificates in the hands of Creeley, ²¹⁰ as her attorney, with the blank powers indorsed uncanceled. Thus by her act he was enabled to commit this fraud. The equities of the respective parties are not equal. Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As Judge King has well expressed this principle in *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. 248: 'The true doctrine on this subject is that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.' The appellee in this case selected the attorney. She had entire confidence in him. She placed these certificates, with the blank powers, in his hands. He proved unworthy of the trust reposed in him. He perpetrated a gross fraud by which he converted this property to his own use. That he was an attorney at law in good standing does not help her case. He added to the crime of which he was guilty that of moral perjury, by the violation of his official oath. On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent? This important element in the case was entirely overlooked by the learned master and the court below; and we think, applying it to the undisputed facts of the case, the appellee's bill as to the appellants ought to have been dismissed."

In the present case there was no negligence on the part of the Corn Exchange National Bank. It is conceded that it took the stock from Stahl & Straub in good faith in the regular course

of business, without any notice of the right, title or interest of the plaintiff in the certificates. Indeed, there was nothing that the Corn Exchange National Bank could or ought to have done that it did not do. If, in the exercise of extraordinary caution, which was not required of it, it had gone and made inquiry of the only persons who could have informed it as to whom the stock had been sold, it would have been informed by Jamison Bros. & Company that they had parted with all interest in the securities and had sold them to Mr. Shattuck, with authority in him to pass them by delivery to anyone who might have purchased ²¹¹ them from him. As stated, the question raised on this appeal is no longer debatable. The judgment of the court below is reversed and the record remitted, with direction to enter judgment in favor of the defendant.

Certificates of Stock, while not negotiable in the full sense of that term (Craig v. Hesperia Land etc. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10; Wallace v. Carpenter Elec. etc. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189), have been given many of the elements of negotiability: Knox v. Eden Musee American Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988. An innocent assignee will hold them against the true owner if he has placed it in the power of the assignor to perpetrate fraud on the assignee: Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691. See, also, Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639. But it has been held that a purchaser of stock indorsed in blank by the owner obtains no better title than his vendor had, in the absence of negligence on the part of the owner: East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, 5 South. 73. Certificates of stock with transfers thereof signed in blank become, in effect, so far as the public is concerned, as if they had been issued to bearer: Fifth Ave. Bank v. Forty-second St. etc. Co., 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378.

PHILLIPS' ESTATE (No. 1).

[205 Pa. St. 504, 55 Atl. 210.]

WILLS—Construction—Contradictory Clauses.—Of two contradictory clauses in a will, the first must give way, and the last take effect if both refer to the same subject matter, and the last is clearly inconsistent with the first. (p. 744.)

WILLS—Construction—Contradictory Clauses.—If the first and main provision in a will plainly covers the whole subject matter, and is defined in terms that exclude all doubt, and a subsequent subsidiary and contradictory provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely or of modifying the original gift, such subsidiary provision must ordinarily be confined to its partial and restricted operation. (p. 744.)

WILLS — Construction — Contradictory Clauses. — The first clearly expressed purpose of a testator in his will, is not to be overborne by subsequent modifying directions therein, that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention. (p. 744.)

WILLS—Construction of Doubtful Clauses—Intestacy.—In the construction of doubtful or inconsistent clauses in a will, that interpretation must be adopted, if possible, which avoids an intestacy. (p. 746.)

W. H. Burnett, J. Weaver, S. D. Page and S. K. Louchheim,
for the appellants.

V. Guillou, for the appellee.

508 BROWN, J. The testator gave the income from his residuary estate to his sisters, Ellen and Emily, for life. Upon the death of both of them he directed certain legacies to be paid, and then gave all of the remainder to certain nephews and nieces. Whether at his death each of them took a vested interest in his estate depends upon his intention, to be gathered from the three following clauses in his will:

“And all the residue and remainder of my residuary estate one-half part thereof I give, devise and bequeath unto the daughters of my deceased brother, J. Altamont Phillips, namely Catharine, Ellen, and Rebecca, and the issue of any of them, that may be deceased, living at the time of my death, share and share alike, such issue taking, however, only their parents' share and in default of issue, any such share shall be divided among the survivors of them as aforesaid.

“And the other one-half part thereof, I give, devise and bequeath unto my nephews as follows: Henry, Edwin and

Charles L., sons of my deceased brother, J. Altamont Phillips, and Myer, H. Cleremont, Altamont P., Zalegman P., and Dr. Franklin J., sons of my sister, Catharine Moses, and the issue of any of them, that may be deceased, living at the time of my death, share and share alike, such issue taking, however, only their parents' share, and in default of issue, any such share shall be divided among the survivors of them as aforesaid.

"Item. It is my will and I so direct that no nephew or niece ⁵⁰⁹ or representative of any such shall have the right to call to account with my executors or trustees until such time as he or she may be entitled to receive in his or her possession the share of the residuary estate, nor shall any estate vest until such time."

With the first two clauses standing alone, it is clear that each nephew and niece, living at the time of the testator's death, took a vested interest in his estate. The same is true of the issue of any nephew or niece so named who might have died during the lifetime of the testator. The words of the first two clauses are so plain and the intention of the testator is so unmistakably expressed that, though he unquestionably could by a later clause provide that the interest should be purely contingent and not vest until the happening of an event after his death, he will not be understood to have done so unless such later clause must be read as expressing a change of his intention so clearly found in the lines immediately preceding it: *Kiver v. Oldfield*, 4 De Gex & J. 30; *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. 1032; *Heck's Estate*, 170 Pa. St. 232, 32 Atl. 413; *Whelen's Estate*, 175 Pa. St. 23, 34 Atl. 329. "While there is no doubt that of two contradictory clauses in a will the first must give way, and the last must take effect, yet the two clauses must refer to the same subject matter, and the last must be clearly inconsistent with the first. If the main provision plainly covers the whole subject, and is defined in terms that exclude all doubt and the subsidiary provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely or of modifying only the original gift, such a subsidiary provision must in the ordinary case be confined to its partial and restricted operation. It is said in 1 Redfield on Wills, *438, that 'plain and distinct words are only to be controlled by words equally plain and distinct.' Such words, to have a controlling effect, must at least possess a definite and certain meaning. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may

justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention": Sheetz's Appeal, 82 Pa. St. 213.

Does the third clause quoted postpone the vesting of the interest until the death of the two sisters of the testator? Its last ⁵¹⁰ words are—and upon these alone the appellants rely—that no estate shall vest until the nephews and nieces, or their issue, are entitled to receive their respective shares, which would be upon the death of both sisters; but what precedes the last words of the clause is consistent with the intention of the testator, as expressed in the first two clauses, that the interest should vest at his death. In providing that his executors should not be annoyed by his nephews and nieces whose dispositions from the appeals before us we can fairly assume he knew, he restricted not only their right, but that of the "representative of any such" to call the trustees to account. "Representative," as here used, can have no other than its natural meaning of personal representative—an executor or administrator—and, in giving it such meaning, the intention of the testator is continued; for the words were useless if the interest of each nephew and niece was only in expectancy and ceased with his or her death. But because the testator intended that the interest should vest immediately, he extended his restriction to the personal representative of any deceased nephew or niece. How, then, did he use the word "vest"?

"If the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word 'vest' is to be taken otherwise than in its strictly legal sense, all discussion is, of course, precluded; for a legacy cannot vest at two different periods. But a question generally arises in these cases as to the real meaning to be attributed to the word": 2 Jarman on Wills, Am. ed., 467.

Recognized meanings of the word "vest" are "payable" and "to vest in possession or take effect in possession": 2 Jarman on Wills, Am. ed., 467; *Thompson v. Thompson*, 28 Barb. 432. The manifest purpose of the clause being protection to the accountants, and all but the last eight words being consistent with the clear intent expressed in the two preceding clauses, the meaning of the word "vest" which ought to be adopted is one which will not strike down, but sustain a clear and general intent. In attributing to it such meaning, often given

to it, the apparent inconsistencies in the will disappear and the intention of the testator cannot be obscured by any argument ⁵¹¹ based on what is generally regarded as the mere technical meaning of the term.

As another reason why the word should be read as meaning "payable" or "taking effect in possession," the learned judge below very pertinently said: "And, finally, there is the argument which in doubtful cases is conclusive that, as there is no limitation over except in the case of the death without issue of a nephew or niece in the lifetime of the testator, a death without issue after his death in the lifetime of the sisters will cause an intestacy; which is never permitted if by any fair construction or interpretation it can be avoided."

Appeals dismissed at the costs of appellants and as to them the decree is affirmed.

If Two Parts of a Will are wholly irreconcilable, the subsequent part is to be taken as evidence of a subsequent intention: *Covenhoven v. Shuler*, 2 Paige, 122, 21 Am. Dec. 73; *German v. German*, 27 Pa. St. 116, 67 Am. Dec. 451; *Pierce v. Ridley*, 1 Bart. 145, 25 Am. Rep. 769. See, too, *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349, 22 N. E. 996; *Estate of Hunt*, 133 Pa. St. 260, 19 Am. St. Rep. 640, 19 Atl. 548. But every word in a will should be given effect if it reasonably can be done: *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 South. 193. And it is presumed that the testator intended to dispose of his entire estate, and not to die partially intestate: *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; *In re Donge's Estate*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786.

PHILLIPS' ESTATE (No. 3).

[205 Pa. St. 515, 55 Atl. 213.]

ASSIGNMENTS—Priority—Notice.—As between successive assignees of a fund in the hands of a third person, that assignee, without regard to the date of his assignment, who first gives the debtor notice of it, obtains priority and is entitled to be first paid. (p. 747.)

ASSIGNMENTS—Priority—Notice.—If an assignee of a fund fails to give notice to the person holding the fund, a subsequent assignee, without notice of the former assignment, will, upon giving notice of his assignment, acquire priority. (p. 749.)

S. D. Matlack and A. L. Moise, for the appellant.

H. La Barre Jayne, for the appellee.

⁵²¹ BROWN J. On July 2, 1895, H. Cleremont Moses, a nephew of Henry M. Phillips, assigned to his wife, Andrena

Moses, fifteen thousand dollars of his interest in his uncle's estate. On February 28, 1899, he and his brother, Altamont, executed a joint assignment of their interest in the estate to the United Security Life Insurance and Trust Company of Pennsylvania, for sixty thousand dollars. Notice of this second assignment was at once given to the accountants by the assignee, and to it the court below awarded the share of H. Cleremont Moses in decedent's estate, on the ground that, though the assignment to Mrs. Andrena Moses was first in time, as she had not given the accountants any notice of it until July 23, 1901, it was postponed to that held by the appellee.

Whether, as between successive assignees of a fund in the hands of a third person, that assignee, without regard to the date of his assignment, who first gives the debtor notice of it, is entitled to be first paid, is a question upon which the American decisions cannot be reconciled. In England it is well settled that the claims of competing assignees of a fund rank, as between themselves, not in the order of the dates of the assignments to them, but according to the dates when they respectively give notice to the debtor of their assignments: *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 1-38; *Pollock on Contracts*, 2 Am. from 4th Eng. ed., 209. The supreme court of the United States seem to have adopted the same view: *Judson v. Corcoran*, 17 How. 612; *Spain v. Hamilton*, 1 Wall. 604. To review the conflicting views entertained by the courts of our different states would needlessly consume pages. With us the question does not seem ever to have been definitely settled. The learned auditing judge, sustained by the court in bank, adopted the rule, that the assignee who first gives notice has the first right to participate in the assigned fund. 522 In adopting this as the better rule, he reasoned by analogy, saying what all of us now approve: "The analogies with regard to sales of personal property in possession are certainly in favor of the view taken in the decisions last referred to, the vendee, in such case, being required for the protection of subsequent purchasers, to take possession, to the exclusion of the vendor, where the property is capable of actual possession, or by assuming such open ownership as the case admits of, where it is not. Why should a different rule apply to purchasers of choses in action? Why should the purchaser not be required to do all that lies in his power to make it impossible for the assignor to commit a fraud or to do an injury to subsequent purchasers, relying on his integrity and having no means of knowing that he

has ceased to be the owner except by inquiry of the person in whose hands the fund is? The failure to give notice to such person puts it in the power of the assignor to do this wrong, and the consequences of the failure ought, therefore, to be upon him who commits it."

As in conflict with the view entertained by the court below, stress seems to be laid by counsel for appellant on *Chew v. Barnett*, 11 Serg. & R. 389; but the general principle there announced applies to a state of facts very different from those here involved. Chew, as the vendee of Wilson, had acquired from the latter nothing but an equitable estate in the land purchased, because at the time Wilson sold he did not hold the legal title. Subsequently, when that title was conveyed to him, he gave a purchase money mortgage to his vendor, and, on a sheriff's sale upon the same, it was simply decided that the title of the sheriff's vendee was superior to that of Chew, just as the legal title of Wilson's vendor had all the time been superior to that of the equitable title conveyed to Chew. The opinion in that case was written by Gibson, J., who, twenty-five years afterward, as chief justice, in *Fisher v. Knox*, 13 Pa. St. 622, 53 Am. Dec. 503, very clearly indicated how he would have decided the present question, if it had then been before him: "The maxim, 'Prior in tempore potior in jure,' holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws, so far as it regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution ⁵²³ to protect from imposition those who may come after him. That a man is bound to enjoy his property so as to do no injury to another which can be prevented, is also a maxim entirely consistent with the preceding one, and equally potent. It contains the ruling principle of an extensive range of cases, and among other cases of injury from negligence. . . . Was there not on the part of the prior assignee in these instances culpable indifference to the interest of others? Though no law requires such an assignment to be docketed, the practice to mark the judgment to the use of the assignee is universal, and it ought to have been pursued here; for no prudent purchaser of a judgment invests his money in it before the record has been inspected. From what else could he derive information? He has nothing for it, but the honor of the assignor; and anyone who leaves it in the power of another to deceive, may be said

to collude with him beforehand. Certainly, a chancellor would not execute an equitable assignment in his favor." Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641, and Pratt's Appeal, 77 Pa. St. 378, are in harmony with what was said in Fisher v. Knox, 13 Pa. St. 622, 53 Am. Dec. 503.

Business transactions constantly require the assignments of choses in action. In many instances personal credit cannot be maintained in any other way, and for assignees who purchase in good faith there ought to be protection. None is found in the recording act, but a measure of it ought not, on that account, to be withheld if it can be extended by courts of equity on equitable principles. The protection invoked by the appellee is against the latent equity of the appellant. If it had been informed of this prior assignment, it is not likely it would have taken the second one from the assignor, who failed to say anything about the first when he made the second. Protection can hardly be expected from an assignor who will sell twice what he knows he has a right to sell but once, for if conscienceless enough to make a second sale, he will conceal the first in his scheme to cheat one or the other of his assignees. Protection can come only from him who owes the money and who, by notice to him, may be able to give protection. He is a mere stakeholder, and it is immaterial to him whom he pays. There is no reason why he should not be frank with a prospective purchaser of the whole or a portion of what he owes, or that, upon inquiry from such an one, he should conceal notice of any other ⁵²⁴ prior purchase or assignment, if notice of it was given him. If it be understood that each assignee of a fund, or a portion of it, can protect himself against subsequent assignees only by giving immediate notice to the debtor, such notice will be given and, when given, the instances will be very rare when subsequent assignees are imposed upon. With the question now fairly before us, we adopt and announce as the only safe rule that, if an assignee fails to give notice to the person holding the fund assigned to him, a subsequent assignee, without notice of the former assignment, will, upon giving notice of his assignment, acquire priority. "By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with the responsibility toward him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from encumbrances, and that the

trustees are still trustees for him and no one else. That precaution is always taken by diligent purchasers and encumbrancers; if it is not taken, there is neglect": *Dearle v. Hall*, 3 Russ. 1. This rule is recognized and approved by the best text-writers: Story's Equity Jurisprudence, secs. 1035a, 1047; Beach on Modern Equity Jurisprudence, sec. 344; Pomeroy on Equity Jurisprudence, sec. 695; Bispham's Principles of Equity, secs. 168, 169. In the last the learned text-writer says: "The decisions, however, in favor of the English rule, appear to be based on the more correct view of the law." As the appellee is claiming under the assignment to it, and not under the attachment issued by it, the second question raised on the appeal need not be considered. Appeal dismissed at appellant's costs, and as to her the decree is affirmed.

The Question Decided in the Principal Case is discussed in the monographic note to *Graham Paper Co. v. Pembroke*, 71 Am. St. Rep. 31-36. See, also, *Phillips' Estate* (No. 4), 205 Pa. St. 525, post, p. 750, 55 Atl. 216.

PHILLIPS' ESTATE (No. 4).

[205 Pa. St. 525, 55 Atl. 216.]

ASSIGNMENTS—Priority—Notice.—If an assignee of a fund as collateral security for the payment of notes writes the holder of the legal title of the fund, offering to sell the notes, and stating that they are secured by the assignment, this is not such notice of the assignment as will secure to such assignee priority over subsequent assignments of the same fund of which proper notice is given. (p. 752.)

ASSIGNMENT—Notice of.—While no special form of notice of an assignment is required, yet to affect one with such notice not formally given, it must come in such a way and under such circumstances to the person alleged to have been notified, that, as a reasonable man, he ought to regard it as notice to control his conduct in relation to the matter of the assignment. (p. 752.)

ASSIGNMENTS—Priority—Notice—Intervening Attachment.—The assignee of a fund who has given no notice of his assignment to the holder of the fund acquires priority over a subsequent assignee of the fund who has given such notice, if a foreign attachment has intervened against the fund between the dates of the two assignments. (p. 752.)

H. La Barre Jayne and Biddle & Ward, for the appellant.

A. L. Moise and S. D. Matlack, for the appellees.


⁵²⁹ BROWN, J. By two assignments dated January 30, 1891, and May 30, 1894, Altamont P. Moses assigned to the Bank of Sumter, South Carolina, ten thousand dollars of his interest in the estate of his uncle, Henry M. Phillips, deceased. On June 1, 1894, he assigned two thousand seven hundred and thirty-six dollars and fourteen cents of this interest to Marion Moise, trustee, and, on February 28, 1899, he and his brother, H. Cleremont Moses, assigned sixty thousand dollars of the same interest to the United Security Life Insurance and Trust Company of Pennsylvania. Between the dates of the last two assignments, on June 3, 1898, a foreign attachment, issued against Altamont P. Moses out of court of common pleas No. 2 of Philadelphia, was served upon the accountants as garnishees. The share of the nephew was awarded by the court below as follows: "1. To the payment of the assignments to the Bank of Sumter; 2. To the assignment of Marion Moise, trustee; 3. Subject to the attachment of Manning et al., to the United Security Life Insurance Company under the assignment and the purchase in pursuance of it."

The award to the Bank of Sumter as holding the first claim on the fund for distribution was on the ground that the assignments to it were not only prior in dates to those of the other two, but that it had given notice of them to the accountants and the United Security Life Insurance and Trust Company before the later assignments were executed. If this award depended upon the notice alleged to have been given to the Pennsylvania Company for Insurances on Lives and Granting Annuities and Henry T. Coleman, executors and trustees, it could not be sustained, for the letter of June 3, 1896, from a ⁵³⁰ representative of the Bank of Sumter to Mr. Henry K. Paul, president of the Pennsylvania Company for Insurances on Lives and Granting Annuities, cannot be regarded as notice given by the bank, or intended to be given by it, of the assignments to it. The letter was one offering to sell the notes held by the bank, and contained a statement that they were secured by the assignments to it. While it is true, as held by the learned judge of the orphans' court, that "no special form of notice of an assignment is required," it is equally true that, to affect one with notice not formally given, it must come in such a way or under such circumstances to the person alleged to have been notified, that, as a reasonable man, he ought to regard it as notice to control his conduct in relation to the matter which is the subject of the notice; on the other hand, if it is manifest

that notice is not intended, it will not be presumed it was received when, from what takes place between the parties, there is nothing from which notice ought to be inferred concerning what may subsequently become a subject of controversy. The letter written by the bank was intended to induce the Pennsylvania Company for Insurances on Lives and Granting Annuities to purchase the notes of Altamont P. Moses. It was one of innumerable business letters received by the company, and, though there is an incidental reference in it to the assignments by Moses, there is nothing in it which ought to have led the company to regard it as notice of them to be remembered for the information of subsequent prospective assignees of the same interest. But, as the Bank of Sumter is entitled to priority over the United Security Life Insurance and Trust Company for the same reason that Marion Moise, trustee, was directed to be first paid, if the appeal of the accountants were to be sustained, the order of distribution would not be changed.

Notice of the assignment to Marion Moise, trustee, was not given until after the assignment to the United Security Life Insurance and Trust Company. But between them attaching creditors intervened. The service of the writ of foreign attachment was prior to the last assignment, and the claim of the attaching creditors is superior thereto. It, however, was subject to the first three, even if the Bank of Sumter and Marion Moise, trustee, had given no notice to the accountants of the assignments to them. The attaching creditors attached only ⁵³¹ what still remained to the debtor. They could get nothing from the accountants by their attachments that did not belong to him when the writ was served. By the service of it they became equitable assignees of what Altamont P. Moses still had a right to assign. As to him the prior assignments, with or without notice to the accountants, were valid, and so they were as against his attaching creditors, whose rights rose no higher than his: *Pellman v. Hart*, 1 Pa. St. 263; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Am. St. Rep. 607, 19 Atl. 342.

Manning et al. must be paid before the United Security Life Insurance and Trust Company, for their attachment is superior to its assignment; but before they can be paid the Bank of Sumter and Marion Moise, trustee, must get their money; and it therefore follows that the assignment to the United Security Life Insurance and Trust Company is subject not only to the attachment, but to the prior assignments. In support



of this view the court below was sustained by many of our cases, from *Wilcocks v. Waln*, 10 Serg. & R. 380, down to *Thomas' Appeal*, 69 Pa. St. 120, and *Miller's Appeal*, 122 Pa. St. 95, 15 Atl. 672.

The appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities and Henry T. Coleman, executors and trustees, is dismissed, the costs of their appeal to be retained by them out of the fund awarded to the assignees and attaching creditors of Altamont P. Moses. The appeal of the United Security Life Insurance and Trust Company is dismissed at its costs, and as to it the decree is affirmed.

The Priority Between Successive Assignees of the same thing or claim is discussed in the monographic note to *Graham Paper Co. v. Pembroke*, 71 Am. St. Rep. 31-36; *Phillips' Estate* (No. 3), 205 Pa. St. 515, ante, p. 746, 55 Atl. 213.

FIRST CHURCH OF CHRIST, SCIENTIST.

[205 Pa. St. 543, 55 Atl. 536.]

PRACTICE OF MEDICINE—Christian Science.—A charter to establish and maintain a place of public worship and to preach the gospel as found in the Bible and a certain Christian Science text-book, and to train persons for the treatment of disease simply and solely by inaudible prayer in the presence of the sick or at a distance, as taught by such text-book, founded on the theory alone that all disease of every nature is a mere belief and not a real fact, and not requiring such persons to have any knowledge of anatomy, physiology, pathology, or hygiene, must be refused on the ground that such system of healing disease is opposed to the general policy of the law, as to the existence, treatment and cure of sickness and disease. (p. 754.)

PRACTICE OF MEDICINE—Christian Science.—A charter to enable an association of persons to treat disease solely by Christian Science, which embraces the theory that disease of every nature can be cured by prayer alone, must be refused on the ground that it is opposed to the general policy of the law regarding the existence, treatment, and cure of disease, and to statutes regulating the qualifications of those who shall be allowed to attempt to cure or heal disease. (p. 756.)

J. W. Laws, for the appellant.

J. Weaver, for the appellee.

548 POTTER, J. The appellants in this case are members of an unincorporated society, and desire to be incorporated as a

church, under the laws of the state of Pennsylvania. Their application as presented to the court below sets forth that the purposes for which the said corporation is to be formed are "to establish ⁵⁴⁹ and maintain a place for the support of public worship and to preach the gospel according to the doctrines of Jesus Christ as found in the Bible and the Christian Science text-book, 'Science and Health, with Key to the Scriptures,' by Mary Baker G. Eddy."

The application was referred to the Honorable Dimner Beeber as master who reported that an examination of Mrs. Eddy's book showed that the church which it was proposed to organize was not merely to inculcate a creed, or to establish a form of worship, but was also intended for the treatment and cure of disease, through the healers which it is to train and constitute. That the method to be pursued by these healers in curing the sick is simply and solely by inaudible prayer, whether in the presence of the sick, or at a distance, being immaterial. That to qualify for the practice of healing disease according to this method nothing was necessary except the study of the system taught in Mrs. Eddy's book, no knowledge of anatomy, physiology, pathology or hygiene being required. The fundamental principle of the teaching of Mrs. Eddy being that what is termed disease has no real existence. That "sickness, sin and death are unknown to truth, and should not be recognized by man as reality." According to the testimony she teaches that inflammation, tuberculosis, hemorrhage and decomposition, are beliefs and not real facts. The master points out that this theory is directly opposed to the general spirit and purpose of the laws of Pennsylvania, with regard to the public health and the treatment of disease. That the quarantine and inspection laws, and the enactments designed to prevent contagion and infection are all based upon the theory that disease is a reality, and that it exists without reference to the condition of mind of its subject. The master reaches the conclusion that "it would be injurious to the community to incorporate a group of citizens who would teach the doctrine that there is no such thing as a contagious disease, or any disease, and practice the art of curing what are called contagious diseases in the manner above described." He further refers to the established policy of the commonwealth, which in the interest of the public good, requires certain qualifications in persons who presume to treat and cure disease, and he tersely adds, "what the good of the community requires under

550 the law as it exists ought not to be imperiled by the incorporation of a group of citizens whose fundamental doctrine is, that the public good requires no such thing." He therefore recommended that the application for the charter be refused.

The court below did refuse to approve the charter, and filed a short opinion, basing the refusal upon the ground that the proposed incorporation was in part at least for profit. Afterward, in a supplemental opinion, he summarized, and adopted the findings of the master, and refused his sanction to the charter upon the ground that the purpose disclosed was improper, and in violation of the law which was intended to prevent the practice of medicine by nonqualified persons.

We are inclined to think that the evidence was not sufficient to support a finding that the corporation itself was to be one for profit. There was proof that the individual healers who are constituted and sent out by the society, do receive compensation for their services, but this seems to be a personal recompense, with which the society has nothing to do. But the court below, in its supplemental opinion, went beyond this question and adopted in substance the conclusion of the master, that the practice of the art of healing or curing disease in the manner set forth in Mrs. Eddy's book is injurious to the community, because it is opposed to the general policy of the law of Pennsylvania relative to the existence and treatment of disease. It was the duty of the court below to refuse the charter if in the exercise of sound legal discretion he found its purpose, in whole or part included anything injurious to the community.

Can it be said that there was an abuse of discretion in the finding in this case? We are not to consider the matter from either a theological or metaphysical standpoint, but only in its practical aspects. It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient. And when the results of this knowledge and experience have been crystallized into legislative enactments, declarative of what the good of the community requires in the treatment of disease, and of the qualifications of those who publicly deal with disease, anything in opposition thereto may fairly be taken as injurious to the community. Our laws recognize 551 disease as a grim reality to be met and grappled with as such. To secure the safety and protect the health of the public from the acts of incompetent persons, the law prescribes the

qualifications of those who shall be allowed to attempt the cure or healing of disease. It is not for the purpose of compelling the use of any particular remedies, or of any remedies at all. It is only designed to secure competent service for those who desire to obtain medical attendance. In certain diseases the individual affected may be the only one to suffer for lack of proper attention; but in other types, of a contagious or infectious nature, they may be such as to endanger the whole community, and here it is the policy of the law to assume control and require the use of the most effective known means to overcome and stamp out disease, which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat, by those not possessing the lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not wholly true. "For none of us liveth to himself, and no man dieth to himself," and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law nor reason has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of other means which have been given to us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine.

The findings of fact by the learned master, and his conclusions of law therefrom, and the opinion of the court below, in which they are summarized and approved, vindicate the action taken.

Under the well-defined policy of the law of Pennsylvania, as at present existing, we are satisfied that there was no abuse of sound legal discretion in refusing the application for a charter.

The appeal is quashed and the order refusing to approve the charter is affirmed.

Practice of Medicine.—As to whether an osteopathist "practices medicine," see *Hayden v. State*, 81 Miss. 291, 33 South. 653, 95 Am. St. Rep. 471, and cases cited in the cross-reference note thereto. And as to a clairvoyant, see *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, 40 N. W. 228. The liability of parents for calling medical aid for children is considered in *People v. Pierson*, 176 N. Y. 201, 98 Am. St. Rep. 000, 68 N. E. 243.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

RUTLEDGE v. FISHBURNE.

[66 S. C. 155, 44 S. E. 564.]

WILLS—Construction—Contingent Remainders—Executory Devises.—A devise to a person named, “for life, with remainder to her children, share and share alike, the child or children of a deceased child to represent and take the parent’s share,” carries a vested transmissible interest in remainder to the child of the life tenant, and children born to such child during the life of the tenant for life take by way of executory devise. (p. 760.)

JUDGMENTS, When Binding on Person not in Being.—Contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance in the land and made a party to the suit. (p. 761.)

JUDGMENTS, When Binding on Persons not in Being.—Executory devisees not yet in being are bound by a decree of foreclosure of mortgage on land, if the contingent remainderman having a vested interest therein is made a party to the suit. (p. 762.)

W. H. Parker, Jr., for the appellant.

T. M. Mordecai, for the appellee.

158 GARY, J. The following facts are stated in the record: “Appeal in this case is from an order and decree of his honor, Judge Benet, holding to be good and valid the title to certain premises in the city of Charleston, bid in by the purchaser, F. Heinz, at master’s sale, under foreclosure in above case, and requiring the purchaser to comply with his bid. The original action was for foreclosure of a mortgage from defendant, Mrs. S. H. M. Fishburne, to the plaintiff, trustee, commenced in the county of Charleston, by the service of a summons, the twenty-seventh day of January, 1900, the complaint alleging the mak-

ing and delivery to the plaintiff, trustee, by the defendant, of a bond of three thousand one hundred dollars, secured by the mortgage of defendant, Mrs. Fishburne, covering six pieces of property in the city of Charleston; amongst others a lot in St. Philip street, in said city, the title of which is in question in this appeal. The defendant filed no answer to the complaint,¹⁵⁷ and proceedings resulted in a decree of foreclosure and sale. Under this decree the master was directed to sell, inter alia, the lot of land on St. Philip street, in the city of Charleston aforesaid. This lot was bid in at master's sale (under advertisement), for the sum of three thousand one hundred and twenty-five dollars by F. Heinz, appellant herein. The master's deed was tendered in the usual form, and the purchaser refused to accept the same or to comply with his bid, alleging defect in the title. Thereupon a rule was issued requiring the purchaser to show cause why he does not comply with the terms of the sale. To this rule the purchaser made his return, which set up the following reasons why he should not be required to comply with his bid: 1. That the interest of Mrs. Sophia H. W. Fishburne in the premises is either a contingent remainder only, such that neither her deed nor the deed of the master under foreclosure of her mortgage can make good title to a purchaser, or, at best, that her interest is a vested remainder in fee defeasible, subject to be divested by her having issue and dying in the lifetime of the life tenant, leaving issue surviving her, in which case such issue would represent her and take by substitution under the limitation in the said will, and the purchaser would have no title. 2. That the words, 'the child or children of a deceased child to represent and take the parents' share' in the following clause of the will: 'unto my said daughter, Sophia Sheppard Marion, for life, not subject to the debts of her husband, with remainder to her children, share and share alike, the child or children of a deceased child to represent and take the parents' share,' created an executory devise. It was referred to the master to inquire into the facts as to the title tendered, and to take testimony and report the same to the court. Upon hearing the master's report, his honor, the circuit judge, overruled the foregoing objections to the title, and ordered the appellant to comply with his bid."

The record contains also the following agreement as to facts: "The S. Sheppard Marion mentioned in the said will as Sophia Sheppard, daughter of testatrix, conveyed all her ¹⁵⁸ interest

in said premises by deed of conveyance in the usual form to her daughter, Helen M. Fishburne, born Marion, the said deed being dated the twenty-third day of May, 1896, and recorded in the register of mesne conveyance's office. Helen M. Fishburne, born Marion, also known as Sophia H. M. Fishburne, is the only child ever born to Sophia S. Marion, mentioned in said will as Sophia Sheppard, said Mrs. Marion being now alive, aged near seventy-seven years. Helen Fishburne, born Marion, only child of Sophia Sheppard Marion, mentioned in said will as Sophia Sheppard, now is forty-five years of age, has been married twenty-one years, has never had any children, her husband, Julian Fishburne, now living."

We will first state in a general way (without reference to the effect of the judicial proceedings, which will hereinafter be discussed), our conclusion of the provision of the will by which the property is devised "unto my said daughter, Sophia Sheppard Marion, for life, not subject to the debts of her husband, with remainder to her children, share and share alike, the child or children of a deceased child, to represent and take the parents' share." It must be remembered that Mrs. Fishburne was in esse when Mrs. S. F. S. Wilson, the testatrix, departed this life, in 1873. Under the foregoing clause of the will, Mrs. Fishburne took a vested transmissible interest in remainder. If other children should be born unto Mrs. Marion, the remainder now vested in Mrs. Fishburne would open so as to embrace such children. If Mrs. Fishburne should die leaving no children, her vested interest would not revert to the estate of Mrs. Wilson (testatrix), but would descend to her (Mrs. Fishburne's) heirs generally, and be subject to distribution under the statute, just as any other property of which she might die seised and possessed. If, however, she should die leaving children at the time of her death, they would take, by substitution, or executory devise, the interest which she otherwise would have taken.

We proceed to consider in what manner such children ¹⁵⁹ would take under the will, whether as contingent remaindermen or executory devisees. In the note to page 922, 20 Encyclopedia of Law, it is said: "The characteristics of alternative or substitutional limitations is that both are contingent, until the event occurs, which is to determine which of them is to take effect. . . . This is well illustrated by the case of *Luddington v. King*, 9 *Ld. Raym.* 203, in which the limitation was to A. for life, remainder to his male issue in fee simple, remainder over to T. B., if A. should die without male issue.

These remainders were alternate, one of which alone can vest, and the vesting of one and the defeat of the other are to take place at the same time, viz.: at the death of A. If the remainder to T. B. had been limited on another contingency, and its vesting was to take place at some other time, or if the limitation to A's issue, was vested, instead of being contingent, the remainder to T. B. would be a remainder limited after a fee." In *Mangum v. Piester*, 16 S. C. 325, the court says: "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for contingent remainders, it is, in that case, a contingent remainder and not an executory devise: 4 Kent. 265. For instance, among the rules governing contingent remainders is one which forbids an estate to be limited over to another after a fee already granted. In such case there can be no such thing as defeating the fee already granted, and transferring it to another, by way of remainder, because a remainder implies something left, which cannot be the case after the whole has been disposed of. Yet while this cannot be done by way of contingent remainder, it may be done by an executory devise which, according to the definition above, allows a departure from the rules of law governing contingent remainders. And this being an effort to create a fee after a fee, is a case of departure denied by contingent remainders but allowed by executory devises."

¹⁶⁰ The following authorities throw light upon this question: 20 Ency. of Law, 835, 874, 921 and note, 922 and note; *Fearne on Remainders*, 373, 418. In commenting on the case of *Loddington v. Kine*, 9 Ld. Raym. 203, hereinbefore mentioned, Mr. Fearne, at page 373, uses this language: "For if A had issue male, the remainder was to vest in that issue in fee; but if A had no issue male, then it was to vest in B in fee; and these were limitations of which the one was not expectant upon and to take effect after the other, but were contemporary; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed."

Much of the confusion upon the question whether the language of a will creates an executory devise or contingent remainder has arisen from the failure to keep clearly in mind the marked and well-defined differences in the characteristics of the two estates. If the words of the will out of which the con-

tingency arises are relied upon for the purposes of defeating an estate which has already become vested, then this can only be done by construing them as an executory devise. But if the question is which of two estates shall become vested, then such estates will be construed as remainders, alternative or substitutional in their nature; and such remainders are always contingent. Our conclusion is, that such children would take by way of executory devise and not as contingent remaindermen.

Having reached this conclusion, the next question that will be considered is, whether the fact that the executory devisees were not made parties to the action for foreclosure of the mortgage, presents a sufficient reason for the refusal of the purchaser to comply with his bid. This question is settled by the case of *Moseley v. Hankinson*, 22 S. C. 323, in which Mr. Chief Justice McIver, in behalf of the court, uses this language: "The general rule in equity undoubtedly is that all persons who are materially interested in the subject of the suit must be made parties, but it is equally true that this rule is subject to some ¹⁶¹ exceptions; and the practical inquiry is, Does this case fall within any of the exceptions? Without undertaking anything like a review of the cases, we think the authorities show that the contingent remaindermen, who were in esse and within the jurisdiction of the court, were necessary parties. In Mitford's Equity Pleadings, *174, it is said: 'Contingent limitations and executory devises to persons not in being may, in like manner, be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights' " (citing numerous authorities). "These authorities establish the doctrine that while, as a general rule, the contingent remaindermen are necessary parties, yet where they are not in esse at the time, and there is before the court a person entitled to a prior vested estate of inheritance, and perhaps, if there is no prior vested estate of inheritance, then if the person entitled to the prior life estate and the trustees are parties, the court may make a decree that will conclude the rights of such contingent remaindermen; but they do not warrant the idea that the contingent remaindermen, who are in esse and can be made parties, can be safely dispensed with. . . . The very object of applying to the court is to obtain authority for dis-

posing of the interests of others, and those really entitled to such interests must, if practicable, be made parties to any proceeding by which it is proposed to dispose of their interests." In the case under consideration the executory devisees are not in esse; therefore, they could not be made parties, and the purchaser of the property under judicial proceedings gets a title stripped of the rights of those persons having merely contingent interests in the property. The court, however, having charge of the fund arising from the sale of the property, always has the power in the exercise of its chancery jurisdiction to pass such an order as will protect the rights of those who cannot be made parties to the action by reason ¹⁶² of the fact that they are not in esse when the sale takes place. These views dispose of all the questions that can be considered in this proceeding.

It is the judgment of this court that the order of the circuit court be affirmed.

JUDGMENTS AGAINST PERSONS NOT IN BEING.

- I. The General Rule as to Parties.
- II. The Doctrine of Representation.
 - a. By the First Estate of Inheritance or Life Tenant.
 - b. What is Sufficient Representation.
- III. Necessity for the Doctrine.
- IV. Interests of Persons not in Esse Must be Transferred to the Fund.
- V. Actions in Which the Principle has been Applied.
 - a. Partition Suits.
 - b. Probate Proceedings.
 - c. Mortgage Proceedings—Accounts.
- VI. Constitutionality of Acts Authorizing Sales of Property of Persons not in Being.

I. The General Rule as to Parties.

The general rule in chancery is that all persons interested in the subject matter of the litigation, whether legally or equitably interested, should be made parties, so that the courts may settle all of their rights at once, and so avoid a multiplicity of suits: *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120; but that, being a general rule, established for the convenient administration of justice, must not be adhered to in all cases, to which consistently with practical convenience, it is incapable of application: *Cockburn v. Thompson*, 16 Ves. Jr. 321. A party may, therefore, be bound by a decree in a suit to which he was not a party by the doctrine of representation, and it is the purpose of this note to determine how far persons not in esse fall within its operation.

II. The Doctrine of Representation.

a. By the First Estate of Inheritance or Life Tenant.—In *Hopkins v. Hopkins*, 1 Atk. 581, it is said: “If there are ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the courts, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be found by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first persons in whom a remainder of inheritance is vested.” And see *Nodine v. Greenfield*, 7 Paige, 544; *Reynolds v. Perkins*, Amb. 564; *Finch v. Finch*, 2 Ves. Sr. 491. In *Giffard v. Hart*, 1 Schoales & L. 386, it is laid down by Lord Redesdale as the rule in courts of equity that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life. The supreme court of Maryland, in *Downin v. Sprecker*, 35 Md. 474, refused to adopt this view. This case is discussed in *Freeman on Judgments*, volume 1, section 172, where that author says: “But in Maryland, where one-sixth of certain property was devised to the testator’s daughter, during her life, and after her decease, to her male children on her body lawfully begotten or to be begotten,” a bill in equity was filed against this daughter and her two sons, by other part owners of the land, alleging that a partition could not be advantageously made, and praying for a sale of the land and the distribution of the proceeds. A decree was subsequently entered in accordance with this prayer, and was succeeded by the sale of the property thereunder. After the death of the daughter, her five sons commenced an action of ejectment to recover possession of one-sixth of the land. Three of the sons had been born since the rendition of the decree under which the sale had been made, and it was contended that as they were not in esse they could not be bound by the decree. The court held that their interest could not be destroyed by their mother as life tenant, nor by their living brothers; ‘that their rights under the will were indestructible by any act of the parties having interests prior to or in common with them,’ and therefore that they were not prejudiced by the decree of sale and the proceedings had in pursuance thereof.

“The difference between the conclusions reached by the court in Maryland, and those announced by Lord Redesdale is this: that in Maryland some person must be brought before the court having an estate of inheritance, and who is on that account entitled to represent both his own interests and the interests of all who may claim after his death; while, according to Lord Redesdale, if there be no person in existence possessing an estate of inheritance, then the tenant for life may be brought before the court and treated as the representative of persons who may, by their subsequent birth, acquire interests in the estate. The views of Lord Redesdale are sustained

by a majority of the reported adjudications on this subject," citing *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Cheeseman v. Thorne*, 1 Edw. Ch. 629; *Freeman v. Freeman*, 56 Tenn. (9 Heisk.) 301; *Miller v. Foster*, 76 Tex. 479, 13 S. W. 529; *Baylor v. Dejarrette*, 13 Gratt. 152; *Faulker v. Davis*, 18 Gratt. 664, 98 Am. Dec. 698; *Miller v. Texas etc. R. Co.*, 132 U. S. 662, 10 Sup. Ct. Rep. 206; *Cockburn v. Thompson*, 16 Ves. Jr. 32; *Gaskell v. Gaskell*, 6 Sim. 643. See, also, *McArthur v. Allen*, 3 Fed. 313; *Gray v. Smith*, 76 Fed. 525.

b. **What is Sufficient Representation.**—Persons not in esse, having only contingent interests, are bound by a judgment recovered against persons legally representing them: *Goebel v. Iffa*, 111 N. Y. 170, 18 N. E. 649, affirming 48 Hun, 21. It, therefore, becomes of the highest importance to determine whether such persons are represented in a given proceeding. The right of partition may be enforced against remaindermen not in esse, where half the land was given to a brother in fee, and the other half to a sister during life, and at her death to such of her children as should be living, such unborn children being virtually represented by certain other remaindermen who were made defendants: *Freeman v. Freeman*, 56 Tenn. (9 Heisk.) 301. So, if the persons in being before the court have the same interest and are equally certain to bring forward the entire merits of the question as those not in being, they will be held to have been represented, and will be concluded by the decree: *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858; *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523. So, where any members of a class to whom an executory devise is limited are in esse, a court of equity will, upon a proper showing, order a sale of the land devised; but it will not where there are no such members in being, they not being represented in such a case: *In re Dodd*, 62 N. C. (Phill. Eq.) 97. Where land was devised to the daughter of the testator for life, remainder to such children as she might leave her surviving, the land was not allowed to be sold for partition during the continuance of the life estate, for until her death those in remainder could not be ascertained: *Ex parte Miller*, 90 N. C. 625. See, also, *Overman v. Sims*, 96 N. C. 451, 2 S. E. 372. In *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30, land was devised by a testator to remain in possession of his daughter and her husband during their lives, and to descend to her children equally. The court held that if the land was sold before her death under the direction of the court in a proceeding in which the children then living were parties, they represented a class (namely, those in esse at the date of her death) and a purchaser would obtain a good title as against after-born children, saying: "If the devise had been to those children living at the death of their mother, there would have been a contingent and not a vested interest in either, for until that event occurred it could not be known who would take, and in such case the contingent interest could not be sold by a court of equity. . . ."

“But when the gift is general, not being confined to survivors, when to take effect, it is otherwise, and by representation, those who may afterward come into being are concluded by the action of the court upon those whose interests are vested, but whose possession is in the future.”

Estates limited over to persons not in esse are represented by the living owner of the first estate of inheritance: *Dunham v. Doremus*, 55 N. J. Eq. 511, 37 Atl. 62; this being upon the principle that the interest of one is involved in that of another. Where, therefore, there is no prior estate of inheritance, and the interests of the heirs at law are not involved in that of another, it does not apply. So, where a husband and wife bring a bill against trustees to reform a marriage settlement made by the latter in contemplation of marriage, on the ground of mistake, her children, who are to take the estate in fee after the death of the party holding the life estate, must be joined as parties; and they, taking as purchasers, will not be affected by any decree to which they are not parties, even though rendered before their birth: *Breit v. Yeaton*, 101 Ill. 242.

The question of virtual representation also arose in the following cases: *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693, 32 N. E. 704; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Moseley v. Hankinson*, 22 S. C. 323; *Harrison v. Walton*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372; *Miller v. Texas etc. Ry. Co.*, 132 U. S. 662, 10 Sup. Ct. Rep. 206.

In *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455, an exception to the doctrine which arose in an English case is discussed, the court saying: “It was said in *Goodess v. Williams*, 2 Young & C. 595, that this principle of virtual representation did not apply to cases where in person seised in fee is liable to have that seisin defeated by a conditional limitation or executory devise; for in such case, the estate is not sufficiently represented by the person having the first estate of inheritance. . . .

“It is difficult to perceive why such a party could not represent these remote interests as well as one holding an estate not thus liable to be defeated. Except in cases involving these interests directly, such as actions for the construction of a will or deed creating these estates, it is difficult to perceive how their interests can conflict. Surely, the same considerations of necessity and convenience might be invoked in favor of applying the same rule to both classes of cases. At all events, the exception, if it exists, should not be extended.”

III. Necessity for the Doctrine.

The necessity for holding that persons not in esse should be bound by a decree of a court of competent jurisdiction is well expressed in *Bofl v. Fisher*, 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627, where it was held that if all persons who could be made parties were brought be-

fore the court, it was sufficient; and the court would proceed to try the cause, though it should appear that persons having more remote interests were not represented, persons not in being falling within that class. The court there remarked: "To say that the court could not under circumstances like these convey away a fee would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus, to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the court, as a party complainant or defendant, according to the usual forms and ordinary practice of the court, would be to sacrifice the rights and interests of the present generation to those of posterity. . . . If the whole property of the country were thus situated, it is obvious that all improvement and advance would be completely checked. And this check upon progress and improvement would be in direct proportion to the extent to which this state of things exists."

IV. Interests of Persons not in Esse Must be Transferred to the Fund.

While courts have power to bar persons not in esse, and the land in such cases will pass free of any outstanding title in them, the interests of such persons must be protected by being transferred to the fund arising from the sale of the land: *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693, 32 N. E. 704. And see *Bowman v. Tallman*, 27 How. Pr. 212. If the judgment does not provide for the interests of persons not in esse by substituting the fund for the land, the contingent interests of such persons will not be concluded, and a proposed vendee need not complete his purchase on account of that flaw in the title: *Monarque v. Monarque*, 80 N. Y. 320; *Barnes v. Luther*, 77 Hun, 234, 28 N. Y. Supp. 400.

If, due to any event, the fund should be lost, the original rights of the parties to the property are not thereby revived, but remain concluded: *Bofil v. Fisher*, 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627.

V. Actions in Which the Principle has been Applied.

a. *Partition Suits.*—The question of binding persons not in esse has arisen most often in partition cases; and the general rule is that partition may be had; that it is no objection that there are remaindermen not yet in esse, who may be entitled; and that a decree of partition will bind them when they come into being: *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Cheeseman v. Thorne*, 1 Edw. Ch. 629; *Kirk v. Kirk*, 137 N. Y. 510, 33 N. E. 552; *Carneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819, 20 S. E. 959; *Wills v. Slade*, 6 Ves. Jr. 498; *Gaskell v. Gaskell*, 6 Sim. 643. See, also, *Van Lew v. Parr*, 2 Rich. Eq. (S. C.) 321. In *Mead v. Mitchell*, 17

N. Y. 210, 72 Am. Dec. 455, partition under New York statutes was held to bar future contingent interests of persons not in esse without publication to bring in unknown parties, even where the claim of such future owners is as purchasers by grant or devise, not under any party to the suit. This decision had been followed in *Clemens v. Clemens*, 37 N. Y. 59; *Brevoort v. Brevoort*, 70 N. Y. 136. And see *Moore v. Littel*, 41 N. Y. 66. But see *Read v. Fife*, 27 Tenn. (8 Humph.) 328, to the effect that real estate conveyed in trust to the present and future heirs of a person cannot be divided between such children till his death, as he may have other children.

b. Probate Proceedings.—The rights of after-born children and the conclusiveness of judgments thereon have also been presented in proceedings in probate courts. Proceedings against the lands of a decedent will not bind a posthumous heir, such heir not being a party thereto. Where, therefore, the lands of a testator were charged by will with his debts, and the legatee under the will died, and the creditors of the decedent filed a bill to enforce their lien against the lands, and made the executor and all the then heirs of the legatee, he being without issue, defendants, obtaining a decree for the sale of the lands, under which they were sold, if a posthumous heir was born to the legatee after the rendition of said decree, whereby his former heirs ceased to be such, the real heir, not being a party to the proceedings, was not bound thereby, and the purchasers at the sale took no title: *McConnel v. Smith*, 39 Ill. 279. See, also, *Detrick v. Migatt*, 19 Ill. 146, 68 Am. Dec. 584.

In California, with little consideration and much absurdity, it was held that a decree distributing the estate of a decedent was void as against the interest of a person not then in esse, and hence constituted no obstacle, after he came in being, to his recovering an interest in such estate, though by such decree it was wholly distributed to others: *In re De Leon's Estate*, 102 Cal. 537, 36 Pac. 864. See *Hotaling v. Marsh*, 132 N. Y. 29, 30 N. E. 249, in which case a final judgment of partition of property devised was construed so as to carry out the intention of the testator in providing for after-born children.

c. Mortgage Proceedings—Accounts.—The right to bind contingent remaindermen and executory devisees not in esse has also arisen in mortgage proceedings; and the same rules apply as in other cases: *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Rutledge v. Fishburne* (principal case), 66 S. C. 155, ante, p. 757, 44 S. E. 564. So, also, in the case of rendering accounts. So where a party is tenant for life of a trust, remainder to his sons, and before a son is born, the life tenant brings a bill against the trustees, and an account is decreed, such account binds the sons: *Leonard v. Sussex*, 2 Vern. 526.

VI. Constitutionality of Acts Authorizing Sales of Property of Persons not in Being.

The legislature may, by special act, authorize the sale of lands of those not capable of acting for themselves, and also the contingent

rights of those not in esse: *Brevoort v. Grace*, 53 N. Y. 245. In *Downin v. Sprecker*, 35 Md. 474, it is said: "Even the power of the legislature to enact laws authorizing sales of land to affect the title of parties not in being has been questioned almost as often as it has been exerted; and it was only after a serious contest and struggle that such laws have been finally sustained by the courts as constitutional and valid."

Where a statute declares that the sheriff's deed upon a sale in partition shall be a bar against all persons interested in the premises who shall have been parties to the proceeding, and against all other persons claiming from such parties or either of them; and that if the interest of any of the parties is uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or contingent remainder, so that such parties cannot be named, it shall be so stated in the petition, these sections do not conflict with the provisions of the constitution, declaring that no property shall be taken without due process of law, but are valid and constitutional.

STATE v. HUDSON.

[66 S. C. 394, 44 S. E. 968.]

CRIMINAL LAW—Circumstantial Evidence.—In order to convict on circumstantial evidence alone, the circumstances relied upon must be proven to the entire satisfaction of the jury, and must be inconsistent with any other reasonable hypothesis than the guilt of the accused. (p. 770.)

CRIMINAL LAW—Appellate Practice—Instructions.—If an instruction on complicity in crime is correct as far as it goes, it is incumbent on the appellant to show that it was prejudicial to his rights and that necessity existed for an amplified statement of the doctrine. (p. 771.)

Jones & Shelor and J. P. Cary, for the appellants.

Assistant Attorney General Townsend, for the appellee.

³⁹⁴ GARY, J. John Hudson, Money Hudson, ³⁹⁵ George Hudson, Thomas Hudson and Jack Centell were all charged in one indictment with the murder of Rachel Thomas, and were tried at the March term of court of general sessions for the county of Oconee. George Hudson and Thomas Hudson were acquitted, and the other defendants were convicted of manslaughter and sentenced. The defendants who were convicted have appealed to this court. The exceptions make the point that the trial judge erred in his charge in two respects: 1. In

charging the rule as to circumstantial evidence; 2. In charging the law as to complicity in crime where several are on trial.

There was no positive testimony as to which of the defendants did the killing, and the case was one of circumstantial evidence. Five persons were jointly indicted for the murder, and there was no direct proof as to who fired the fatal shot; but the state relied upon the theory that all the parties charged went to the house of the deceased for an unlawful purpose, and that all of the defendants, or such of them as went there under the common design, were just as guilty as the one who fired the fatal shot.

The exceptions assign error as follows: "1. Because the circuit judge erred in charging the jury as follows as to circumstantial evidence: 'These circumstances surrounding the transaction should be proved to your entire satisfaction—that is to say, the different incidents, each one, must be proved to your entire satisfaction. The circumstances must be consistent with themselves, and they must all point to one thing, the guilt of the defendants; and any other reasonable theory than the theory that the defendants at the bar, charged with the crime, did do it, would tend to prove that they were not guilty'; whereas, he should have charged the jury that the circumstances must point conclusively to the guilt of the defendants, and that if any other reasonable theory than the theory that the defendants committed the crime should appear, the defendants were entitled to a verdict of not guilty.

"2. Because the circuit judge, when he undertook to ~~896~~ charge the rule as to circumstantial evidence, erred in not charging the true rule as follows: That the circumstances must be proved to the entire satisfaction of the jury, and when these circumstances are so established, they must point conclusively to the guilt of the defendants, and must be inconsistent with any other reasonable hypothesis.

"3. Because the circuit judge erred in charging the jury that 'if the men went to Rachel Thomas' house for the purpose of, not killing her, but to do a wrongful act, to do an illegal act, and yet not to kill, and if as a result of that illegal act springing out of it, if under these circumstances Rachel Thomas was killed, then that is manslaughter'; whereas, he should have charged the jury that if the men went to the house of Rachel Thomas with a common purpose to do an illegal act, and in the execution of this common purpose Rachel Thomas was

killed by one of the defendants, as a probable or natural consequence of the acts done in pursuance of the common design, then the person present participating in the unlawful common design would be as guilty as the actual slayer; but if the killing had no connection with the common purpose and did not ensue as a probable result of an attempt to execute it, then the slayer alone would be responsible for the killing.

"4. Because the defendants being indicted jointly for killing Rachel Thomas, and it appearing that only one shot was fired, and that shot resulted in her death, the circuit judge, in his charge with reference to convicting some of the defendants and acquitting others, ignored the view that one of the defendants might have done the act without the concurrence or aid of the others.

"5. Because the circuit judge in his charge erred in ignoring the view that if, without concert or combination, one of the defendants, upon sudden quarrel or other cause without the aid or support of the others, took the life of the deceased, he alone who did the act would be responsible."

We will first consider the exceptions relating to circumstantial evidence. The appellants contend that his honor, ³⁹⁷ the presiding judge, erred in stating the rule to be that the circumstances are required merely to point to the guilt of the defendants; whereas, they submit the correct rule requires the circumstances to point conclusively to the guilt of the defendants. The rules as to circumstantial evidence are thus stated in 1 Starkie on Evidence, 570-574: "1. The circumstances from which the conclusion is drawn should be fully established; 2. All the facts should be consistent with the hypothesis; 3. The circumstances should be of a conclusive nature and tendency; 4. The circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved." These rules are approved in *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

Under the charge of the presiding judge, it was necessary that the jury should be satisfied entirely that the circumstances pointed to the guilt of the defendants. He charged: "These circumstances surrounding the transaction must be proved to your entire satisfaction—that is to say, the different incidents each one must be proved to your entire satisfaction." The charge substantially set forth the requirements of the rule, and this objection must be overruled.

The appellants also contend that the circuit judge erred in instructing the jury that if any other reasonable theory than the guilt of the defendants appeared, it would tend to prove that they were not guilty; whereas, the correct rule requires the state, before a party can be convicted, to show that the circumstances relied upon are inconsistent with any other reasonable hypothesis than the guilt of the accused. By reference to rule 4, hereinbefore mentioned, it will be seen that the circuit judge erred in charging that if any other reasonable theory than the guilt of the defendants appeared, it would only tend to prove that they were not guilty, for under the said rule such facts would conclusively show that they were not guilty. The exceptions raising this question are, therefore, sustained.

We will next consider the exceptions relative to complicity ³⁹⁸ in crime. The case of the State v. Carson, 36 S. C. 524, 15 S. E. 588, shows that the charge was correct, as far as it went. It is incumbent upon the appellants to show that the charge was prejudicial to their rights, and that the necessity existed for an amplified statement of the doctrine. The testimony is not set out in the record, nor is there anything in the statement of facts contained in the record which shows that the charge was prejudicial to the defendants. Under these circumstances, the exceptions must be overruled.

It is the judgment of this court that the judgment of the circuit court be set aside, and the case remanded to that court for a new trial.

Jones and Woods, JJ., concur in the result.

CIRCUMSTANTIAL EVIDENCE.*

- I. Necessity for Circumstantial Evidence.**
- II. Definition, Advantages and Disadvantages.**
- III. What is Sufficient to Convict.**
- IV. Relative Value of Circumstantial and Direct Evidence.**
 - a. In General.
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- V. Must Exclude Every Reasonable Hypothesis but Guilt.**
- VI. Degree of Proof Required of Each Circumstance.**
 - a. The Two Views.
 - b. Proof of Circumstances Relied on by the Prosecution.

*REFERENCES TO MONOGRAPHIC NOTES.

Circumstantial evidence: 62 Am. Dec. 179.

Reasonable doubt where the evidence is circumstantial: 48 Am. St. Rep. 574.

VII. What Circumstances may be Given in Evidence.

- a. Liberal Policy of the Law as to Admissibility.
- b. Evidence of Flight.
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IX. Circumstantial Evidence as Secondary Evidence.**X. Instructions on Circumstantial Evidence.**

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- l. Instructions on the Weight of Circumstantial Evidence.
 - 1. Question for the Jury.
 - 2. Statutory Prohibition on Comments on the Weight of Evidence or on the Facts.
 - 3. Comments by Courts on Circumstantial Evidence.

XI. In Civil Cases.

- a. Admissibility in General.
- b. Sufficiency Required for a Verdict.

I. Necessity for Circumstantial Evidence.

The necessity of the admission of circumstantial evidence in criminal cases is too well established to need dwelling on to any great extent. Most crimes being committed in secret, if the direct testimony of eye-witnesses were required, but few convictions could be had: *State v. Goldsborough*, 1 Houst. C. C. 302; *Newman v. State*, 26 Ga. 693; *People v. Cunningham*, 6 Park. Cr. (N. Y.) 398; *Buel v. State*, 104 Wis. 132, 80 N. W. 78. Therefore guilt may be shown by circumstances in cases, among others, of killing: *Crawford v. Cheney*,

3 Mart., N. S. (La.), 143; of burglary: *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; of adultery: *Brown v. State*, 108 Ala. 18, 18 South. 811; *State v. Hart*, 94 Iowa, 749, 64 N. W. 278; of conspiracy: *Caddell v. State* (Ala.), 30 South. 76, 34 South. 191; *Martin v. State* (Ala.), 34 South. 205; *Musser v. State* (Ind.), 6 N. E. 1; the proof of such crimes by direct testimony being, from their very nature, especially difficult. While circumstances are sufficient to convict, caution should be used: *United States v. Martin*, 2 McLean, 256, Fed. Cas. No. 15,731.

II. Definition, Advantages and Disadvantages.

Direct evidence differs from circumstantial, in this, that in the former witnesses testify directly of their own knowledge of the main fact or facts to be proven; while the latter is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind: *State v. Avery*, 113 Mo. 475, 21 S. W. 193; or, as it is stated in *Beason v. State*, 43 Tex. Cr. App. 442, 67 S. W. 96: "The distinction between circumstantial evidence and direct evidence is that in the first instance the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which, by indirection, logically and rationally demonstrates the *factum probandum*."

Evidence of this character has been divided into two classes: 1. Certain, or that from which the conclusion in question necessarily follows; 2. Uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning: *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525.

The relative advantages of circumstantial and direct testimony are pointed out by Chief Justice Shaw in the leading case of *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711, in the following words: "Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood."

The court then discussed circumstantial evidence, saying: "The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and so-

briety of judgment, to make hasty and false deductions, a source of error not existing in the consideration of positive evidence."

III. What is Sufficient to Convict.

From the manifold forms which circumstantial evidence may assume, it can never be laid down as a matter of law what is sufficient to amount to proof of guilt so as to convict: *Whetston v. State*, 31 Fla. 240, 12 South. 661; *Myers v. State* (Fla.), 31 South. 275; *Otmer v. People*, 76 Ill. 149; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244; *McCann v. State*, 21 Miss. (13 Smedes & M.) 471; *Browning v. State*, 33 Miss. 47; *Williams v. State*, 41 Tex. 209. In cases both of circumstantial and direct evidence, it must be such as to satisfy the jury of the guilt of the accused beyond a reasonable doubt, and if it reaches that standard they should convict, an absolute demonstration of guilt not being required: *Morris v. State*, 124 Ala. 44, 27 South. 336; *People v. Bellamy*, 109 Cal. 610, 42 Pac. 236; *State v. Rome*, 64 Conn. 329, 30 Atl. 57; *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210; *Law v. State*, 33 Tex. 37.

Some cases hold that there is no ground of distinction, as all evidence is more or less circumstantial, the difference being only in degree: *Territory v. Egan*, 3 Dak. 119, 13 N. W. 568; *Commonwealth v. Harman*, 4 Pa. St. 269, 6 Pa. L. J. 120.

IV. Relative Value of Circumstantial and Direct Evidence.

a. In General.—Most of the decisions are to the effect that circumstantial evidence may be fully as satisfying as positive testimony, and will sometimes outweigh it: *State v. Taylor*, 1 Houst. C. C. (Del.) 436; *State v. Miller*, 9 Houst. (Del.) 564, 32 Atl. 137; *State v. Evans*, 1 Marv. (Del.) 477, 41 Atl. 136; *Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 839; *The Brig Struggle*, 9 Cranch, 71; *The Robert Edwards*, 6 Wheat. 187; *United States v. Cole*, 5 McLean, 513, Fed. Cas. No. 14,832. It deserves a like consideration as the sworn statements of a witness, and may disprove the testimony of living witnesses: *Rice v. McFarland*, 41 Mo. App. 489; and, as it loses nothing by the weight of time, has been held to preponderate over the recollection of a witness after a lapse of seventeen years: *Ridley v. Ridley*, 41 Tenn. (1 Cold.) 323. It is not error in a criminal case to refuse to charge the jury that circumstantial evidence is inferior to direct: *Cook v. State* (Miss.), 28 South. 833; nor is it to instruct that it may rise so high as to generate full conviction, and produce the highest degree of moral certainty: *Gibson v. State*, 76 Miss. 136, 23 South. 582; nor that there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence: *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; following *People v. Morrow*, 60 Cal. 142. In *United States v. Pacific Exp. Co.*, 15 Fed. 867, the court charged that if circumstantial evidence preponderated, or overthrew, or overcame in the minds of the jury the direct positive

testimony of witnesses, they had the right to take that kind of evidence and give it all the weight it was entitled to.

In *Bowie v. Maddox*, 29 Ga. 285, 74 Am. Dec. 61, it was held error to charge that circumstances could not outweigh direct testimony, for one might outweigh the other, according to the case. An instruction that the jury should give the same weight to the circumstantial as to the direct evidence, was held to be better omitted, although not prejudicial in that case: *Davis v. State*, 51 Neb. 301, 70 N. W. 984.

For a case in which direct evidence is held superior to circumstantial, see *Edmonds v. State*, 34 Ark. 720. In *People v. Videto*, 1 Park. Cr. (N. Y.) 603, however, it is said that circumstances cannot lie, although the witnesses may, and the latter class of evidence is preferred.

The force of circumstantial evidence depends not only on the consideration that the facts, on which the presumptions are based, are ascertained, but also that nothing is withheld, which, if produced, would show a different state of facts or authorize an opposite deduction therefrom: *Plummer v. Baskerville*, 36 N. C. (1 Ired. Eq.) 252. In *United States v. Searcey*, 26 Fed. 435, it is held that when such evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent, and tends to the same conclusion, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances. The facts from which the deduction is to be made must be positively proved, and it is useless if they themselves depend upon inference: *People v. Kennedy*, 32 N. Y. 141. See, also, *Wroth v. Norton*, 33 Tex. 192. They must be proved beyond a reasonable doubt: *Gill v. State*, 59 Ark. 422, 27 S. W. 598.

b. Circumstances must be Taken as a Whole.—The circumstances, in drawing conclusions therefrom, must be taken as a whole: *Whitlatch v. Fidelity etc. Co.*, 21 App. Div. 124, 47 N. Y. Supp. 331, where the court said: "There has probably never been a case resting upon circumstantial evidence that did not admit of a theory or theories inconsistent with the conclusion to which all the circumstances, taken together, point with more or less accuracy. The strength of circumstances does not lie in segregating them into groups and drawing conclusions therefrom. Such a course may make them point in many directions. Considered separately, they are no more than a false light. No course with respect to this character of proof can be followed with any degree of certainty, nor can results therefrom approximate to accuracy, except considering such circumstances separately, and as a whole, giving to each its due weight, and then, from a consideration of the whole, drawing the conclusion. Any other rule destroys its value as evidence."

c. Need not Establish Nearly Same Degree of Certainty as Direct Testimony.—It was formerly held in California that it was correct to instruct that to convict, circumstantial evidence should be such

as to produce "nearly" the same degree of certainty as that which arises from direct testimony: *People v. Cronin*, 34 Cal. 191, which was followed in *People v. Padillia*, 42 Cal. 535; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359. This same instruction was before the supreme court of Montana, in *State v. Ryan*, 12 Mont. 297, 30 Pac. 78, and it was held an incorrect presentation of the law, saying that the proposition had been deserted in California, although still retained in Nevada: *State v. Nelson*, 11 Nev. 334. See to the same effect *State v. Dugan*, 12 Mont. 300, 30 Pac. 79; *State v. Dotson*, 26 Mont. 305, 67 Pac. 938.

d. Need not Equal Testimony of One Credible Eye-witness.—It is not necessary, in order to convict on circumstantial evidence, that the circumstances proved produce as full conviction as the positive testimony of a single credible eye-witness; and refusal so to instruct is not error: *Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415; *Matthews v. State*, 55 Ala. 65, 28 Am. Rep. 698; *Banks v. State*, 72 Ala. 522; *Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 South. 356; *People v. Cronin*, 34 Cal. 191; *Bixby v. Carskaddon*, 55 Iowa, 533, 8 N. W. 354; *State v. Coleman*, 22 La. Ann. 455; *State v. Norwood*, 74 N. C. 247; *State v. Allen*, 103 N. C. 433, 9 S. E. 626; *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; *Rea v. State*, 76 Tenn. (8 Lea) 356.

V. Must Exclude Every Reasonable Hypothesis but Guilt.

The nature of circumstantial evidence being such that a certain conclusion or state of facts is sought to be inferred from the establishment of other facts, it is necessary, not only that the guilt of the accused be consistent with those facts, but they must exclude every reasonable hypothesis other than his guilt; or as it is sometimes expressed, they must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused. The reason for this is, that as long as the circumstances are capable of two or more explanations, one consistent, and the other inconsistent with his innocence, the evidence does not fill the test of moral certainty, and is therefore insufficient to convict. This rule is supported by the following decisions: *Childs v. State*, 58 Ala. 349; *Ex parte Acree*, 63 Ala. 234; *Gilmore v. State*, 99 Ala. 154, 13 South. 536; *People v. Shuler*, 28 Cal. 490; *People v. Dick*, 32 Cal. 213; *State v. Goldsborough*, 1 Houst. C. C. (Del.) 302; *State v. Taylor*, 1 Houst. C. C. (Del.) 436; *State v. Fisher*, 1 Penne. (Del.) 303, 41 Atl. 208; *Whetston v. State*, 31 Fla. 240, 12 South. 661; *Orr v. State*, 34 Ga. 342; *Martin v. State*, 38 Ga. 293; *Tate v. State*, 110 Ga. 310, 35 S. E. 154; *Williams v. State*, 113 Ga. 721, 39 S. E. 487; *Marzen v. People*, 173 Ill. 43, 50 N. E. 249; *Schusler v. State*, 29 Ind. 394; *Beavers v. State*, 58 Ind. 530; *State v. Maxwell*, 42 Iowa, 208; *State v. Hart*, 94 Iowa 749, 64 N. W. 278; *State v. Vinson*, 37 La. Ann. 792; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Webb v.*

State, 73 Miss. 456, 19 South. 238; State v. Avery, 113 Mo. 475, 21 S. W. 193; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; Casey v. State, 20 Neb. 138, 29 N. W. 264; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Kastner v. State, 58 Neb. 767, 79 N. W. 713; Tatum v. State, 61 Neb. 229, 85 N. W. 40; Lamb v. State (Neb.), 95 N. W. 1050; State v. Ah Kung, 17 Nev. 361, 30 Pac. 995; Territory v. Lermo, 8 N. Mex. 566, 46 Pac. 16; Stephens v. People, 4 Park. Cr. (N. Y.) 396; People v. Cunningham, 6 Park. Cr. (N. Y.) 398; State v. Wilcox, 132 N. C. 1120, 44 S. E. 625; Lancaster v. State, 91 Tenn. 726, 18 S. W. 777; Perkins v. State, 32 Tex. 109; Williams v. State, 41 Tex. 209; Johnson v. State, 18 Tex. App. 385; Hester v. State (Tex. Cr. Rep.), 51 S. W. 932; Kollock v. State, 88 Wis. 663, 60 N. W. 817; United States v. Douglass, 2 Blatchf. 207, Fed. Cas. No. 14,989; United States v. McKenzie, 35 Fed. 826; United States v. Reder, 69 Fed. 965. This rule applies only to cases depending on circumstantial evidence: Cohen v. State, 32 Ark. 226.

The law requires no more than that every reasonable or rational hypothesis other than guilt be excluded, and does not demand that it be proved to the exclusion of every hypothesis, as that would be requiring proof beyond the possibility of a doubt, which is a greater test than the law demands: Little v. State, 89 Ala. 99, 8 South. 82; Garrett v. State, 97 Ala. 18, 14 South. 327; Culver v. State, 99 Ala. 193, 13 South. 527; Horn v. State, 102 Ala. 144, 15 South. 278; Crawford v. State, 112 Ala. 1, 21 South. 214; Walker v. State, 134 Ala. 86, 32 South. 703; People v. Ward, 105 Cal. 335, 38 Pac. 945; Kendrick v. State, 55 Miss. 436; State v. Schoenwald, 31 Mo. 147; Murphy v. People, 4 Hun, 102, 6 Thomp. & C. 369; People v. Riley, 3 N. Y. Cr. Rep. 374; State v. Matthews, 66 N. C. 106; State v. Glass, 5 Or. 73; Payne v. State, 12 Tex. Ap. 283; Hamlin v. State, 39 Tex. Cr. App. 579, 47 S. W. 656.

The phrase "absolutely incompatible with the innocence of the accused" has been made mention of in this connection. In *People v. Murray*, 41 Cal. 66, it was held that the existence of the inculpatory facts in circumstantial evidence need not be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, the true rule being that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion; to require absolute incompatibility with innocence being to require proof of guilt beyond the possibility of a doubt. To the same effect are *Mitchell v. State*, 114 Ala. 1, 22 South. 71; *State v. Rover*, 13 Nev. 17; *Horn v. State* (Wyo.), 73 Pac. 705.

The case of *People v. Murray*, 41 Cal. 66, was discussed in a subsequent decision of that state: *People v. Gosset*, 93 Cal. 641, 29 Pac. 246. There the trial court, after telling the jury that mere preponderance of evidence was not sufficient to convict, added: "And on the other hand, it is not required that the inculpatory facts shall be incompatible with the innocence of the accused." This the su-

preme court held error, saying: "The only shadow of authority for the language used in the instruction which has been called to our attention is to be found in *People v. Murray*, 41 Cal. 66. In that case no such instruction had been given; but a very extreme instruction on the subject had been asked by the defendant and had been refused, and the refusal was held not to have been erroneous. The instruction asked included the words 'absolutely incompatible'; and the court seemed to think that these words 'require proof of his guilt beyond the possibility of a doubt.' The court says, however, in its opinion, that 'the law requires that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion,' and it is difficult to see the difference between that language and the instruction asked by the defendant in that case, unless we view the court as attaching large significance to the word 'absolutely.' "

The phrase "absolutely incompatible with innocence" was held correctly used in *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *Barnes v. State*, 41 Tex. 342.

While the evidence should be of so convincing a character as to prove beyond a reasonable doubt that the accused, and no one else, committed the crime: *Kaiser v. State*, 35 Neb. 704, 53 N. W. 610, it is not necessary to show that it was not in the power of any person, other than the defendant, to have committed the offense: *Findley v. State*, 5 Blackf. (Ind.) 576, 36 Am. Dec. 557; *Commonwealth v. Leach*, 156 Mass. 99, 30 N. E. 163; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *James v. State*, 45 Miss. 572. See, also, *Territory v. De Gutman*, 8 N. Mex. 92, 42 Pac. 68.

If the evidence, though circumstantial, leads to the conclusion that the defendant is guilty, and precludes every reasonable hypothesis inconsistent therewith, the verdict will not be set aside as being against the evidence or based on insufficient testimony: *Coleman v. State*, 26 Fla. 61, 7 South. 367; *Barrett v. State* (Tex. Cr. App.), 33 S. W. 1085; *Kelley v. State* (Tex. Cr. App.), 70 S. W. 20; *State v. Hallock*, 70 Vt. 159, 40 Atl. 51. If, however, the circumstances, no matter how strong, can be reasonably reconciled with the theory that some other person may have done the act, the defendant should not be convicted; and a verdict of guilty will be set aside as contrary to law: *Ex parte Acree*, 63 Ala. 234; *Pickens v. State*, 115 Ala. 42, 22 South. 551; *Myers v. State* (Fla.), 31 South. 275; *Wells v. State*, 7 Ga. 209, 22 S. E. 958; *Shigg v. State*, 115 Ga. 212, 41 S. E. 694. The mere fact that the circumstances are strongly suspicious, and the defendant's guilt probable is not sufficient to sustain a conviction: *Andrews v. State*, 116 Ga. 83, 42 S. E. 476; *People v. Maxwell*, 86 Hun, 620, 33 N. Y. Supp. 794; *Algheri v. State*, 25 Miss. 584; *Black v. State*, 1 Tex. App. 368.

So where, in an action for shooting animals of the plaintiff, the only evidence against the defendant consists of threats to shoot

the animals, and the defendant swears he did not do it, which is corroborated, a verdict in his favor will stand: *Bolar v. Williams*, 14 Neb. 386, 15 N. W. 716. And it is not sufficient to justify a conviction where the only circumstance to connect the defendant with the act is the fact that tracks seen near the place of the crime corresponded in minute particulars with the boots of the defendant, such fact alone not excluding a reasonable hypothesis of innocence: *Cummings v. State*, 110 Ga. 293, 35 S. E. 117; *State v. Johnson*, 19 Iowa, 230. So where there is no direct testimony and the circumstances do not point to the defendant more than to any other of the persons capable of committing the crime, of whom there are several, the evidence does not satisfy the mind to a moral certainty that the defendant is guilty: *Territory v. Rehberg*, 6 Mont. 467, 13 Pac. 132. In a murder case, where the circumstances are such that it may well follow that death was produced by natural causes, there is a failure of proof and a conviction will be reversed: *Dreessen v. State*, 38 Neb. 375, 56 N. W. 1024.

VI. Degree of Proof Required of Each Circumstance.

a. **The Two Views.**—While there is no question as to the law that the circumstances must be such as to be consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis in order to convict, difficulty has arisen as to the degree of proof of each fact or circumstance going to make up the sum total of incriminating evidence.

In *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711, speaking of the well-established rules to be applied to the reception and effect of circumstantial evidence, Chief Justice Shaw said: "The first is, that the several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. . . .

"The next rule to which I ask attention is, that all the facts proved must be consistent with each other, and with the main fact sought to be proved. When a fact has occurred, with a series of circumstances preceding, accompanying, and following it we know that these must all have been once consistent with each other, otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail."

This is considered to be a correct exposition of the law, and each fact necessary to establish the conclusion must be proved by the same evidence as if it were the main fact: *People v. Phipps*, 39 Cal. 326; *People v. Ah Chung*, 54 Cal. 398; *Sumner v. State*, 5 Blackf.

(Ind.) 579, 36 Am. Dec. 561; *People v. Aiken*, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821; *People v. McArron*, 121 Mich. 1, 79 N. W. 944; *State v. Crabtree*, 170 Mo. 642, 71 S. W. 127; *Marion v. State*, 16 Neb. 349, 20 N. W. 289; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361; *Smith v. State*, 61 Neb. 296, 85 N. W. 49; *Lamb v. State* (Neb.), 95 N. W. 1050; *State v. Messimer*, 75 N. C. 385; *State v. Carson*, 115 N. C. 743, 20 S. E. 384; *Hodge v. Territory* (Okla.), 69 Pac. 1077; *State v. Glass*, 5 Or. 73; *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; *Black v. State*, 1 Tex. App. 368; *Hampton v. State*, 1 Tex. App. 652; *Barr v. State*, 10 Tex. App. 507; *Campbell v. State*, 10 Tex. App. 560; *Scott v. State*, 19 Tex. App. 325; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *Kollock v. State*, 88 Wis. 663, 60 N. W. 817.

There is, however, another line of cases to the effect that it is not necessary that each circumstance relied on be proved beyond a reasonable doubt, but the test is whether, on a consideration of the whole case, the jury still entertain a reasonable doubt as to the defendant's guilt: *Lackey v. State*, 67 Ark. 416, 55 S. W. 213; *State v. Hayden*, 45 Iowa, 11; *State v. Hossack*, 116 Iowa, 194, 89 N. W. 1077. These decisions do not consider circumstantial evidence as though it were a chain, and consequently no stronger than its weakest link, but rather as a rope, composed of numerous strands, some of which are sufficient to support a given weight, although others alone might be too weak for that purpose: *Rayburn v. State*, 69 Ark. 177, 63 S. W. 356. This is clearly pointed out in *Clare v. People*, 9 Colo. 122, 10 Pac. 799, where it is said: "It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to the different circumstances as links constituting such chain; for a chain cannot be stronger than its weakest link, and if one link fails the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half-dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking." See to the same effect *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *United States v. Searcey*, 26 Fed. 435. Circumstantial evidence is not necessarily composed of links, and refusing to charge that if there is a single link wanting, the jury should acquit, is not erroneous: *Tompkins v. State*, 32 Ala. 569; *Wharton v. State*, 73 Ala. 366; *Grant v. State*,

97 Ala. 35, 11 South. 915; Harvey v. State, 125 Ala. 47, 27 South. 763.

In *State v. Young*, 9 N. Dak. 165, 82 N. W. 420, the court instructed the jury that they were not required to be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied on, but it was sufficient if, taking the testimony as a whole, they were satisfied of his guilt beyond a reasonable doubt. It was held error, the testimony in that case including circumstances arranged linkwise as well as independent circumstances; and such instruction could not therefore be but prejudicial. The charge might be correct, the court held, if the circumstances were entirely independent, the chain metaphor being inapplicable, for in such a case an instruction that each link must be proved beyond a reasonable doubt would only tend to confuse the jury. See *State v. Shines*, 125 N. C. 730, 34 S. E. 552, to the effect that circumstances may be like a chain, each fact depending on every other; or else, like a rope, the circumstances accumulating, each one by itself.

If a conviction depends on circumstances arranged linkwise, each circumstance must be established beyond a reasonable doubt; but the minor circumstances need not be so proven: *State v. House*, 108 Iowa, 68, 7 N. W. 859; *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857; nor collateral or corroborative circumstances: *State v. Kruger*, 7 Idaho, 178, 61 Pac. 463.

b. **Proof of Circumstances Relied on by the Prosecution.**—Some question has arisen as to how far the facts "relied upon" by the prosecution for conviction must be proven. In *State v. Fleming*, 130 N. C. 688, 41 S. E. 549, it was held that each fact upon which it relied had to be proved beyond a reasonable doubt: Citing *State v. Crane*, 110 N. C. 536, 15 S. E. 231; *State v. Shines*, 125 N. C. 730, 74 Am. St. Rep. 663, 34 S. E. 264. Other decisions hold that if some of the facts relied on by the state are not clearly established, the remaining circumstances should be taken into account in determining guilt or innocence: *Davis v. State*, 74 Ga. 869. "It is permissible for the state to introduce evidence of any number of facts and circumstances tending to connect the defendant on trial with the offense charged. In so doing it may be said to rely upon each and all of the facts thus sought to be established, and if those actually proved beyond a reasonable doubt are sufficient to exclude to a moral certainty every reasonable hypothesis, save that of the defendant's guilt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts thus relied upon": *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Kastner v. State*, 58 Neb. 767, 71 N. W. 712. And it is not error for the court to refuse to charge that if a single circumstance proven is inconsistent with the guilt of the accused, he should be acquitted, there being a distinction between circumstances proven and a necessary link in the chain of circumstances: *People v. Willett*, 105 Mich. 110,

62 N. W. 1115. And see *State v. Johnson*, 37 Minn. 493, 35 N. W. 373, holding it correct for the court to refuse to charge that if a single fact, proved to the satisfaction of the jury, was inconsistent with defendant's guilt, he should be acquitted.

In *Timmerman v. Territory*, 3 Wash. Ter. 445, 17 Pac. 624, the following instruction was asked and refused: "When circumstances alone are relied upon by the territory for conviction, each and every circumstance must be consistent with the other, and with the whole chain; and each and all must point to the defendant exclusively as the guilty agent." Refusal to give it was held not error, as it was likely to mislead, for the circumstances might point to two persons as the guilty parties, the defendant being one of them; and one or more of the circumstances proved might have no reference whatever to the defendant or to the crime charged, or form no part of the chain, or not point to any particular fact connected with the crime.

An instruction that if the jury find from the evidence that all the criminating circumstances relied upon by the prosecution to convict will as well apply to another person as to the defendant, they must acquit, is erroneous, for under it, if any part of the criminating circumstances, or all of them but one, should apply to some other person than the defendant, it would not help him, as the court had said that all must apply: *Dossett v. United States*, 3 Okla. 591, 41 Pac. 608.

VII. What Circumstances may be Given in Evidence.

a. **Liberal Policy of the Law as to Admissibility.**—It next becomes necessary to determine what facts may be given in evidence where the direct testimony of witnesses is wanting. The policy of the courts in this connection is extremely liberal in the admission of any circumstances which may throw light upon the matter before them. While evidence of single circumstances, standing alone, might not be sufficient to warrant the conviction of one accused of crime, the combined force of many concomitant and interlacing circumstances, each insufficient in itself, may lead a reasoning mind irresistibly to a conclusion of guilt: *State v. Lambert*, 97 Me. 51, 53 Atl. 879; or, as it is expressed in *United States v. The Isla de Cuba*, 2 Cliff. 295, Fed. Cas. No. 15,447: "Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony, upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other or with the direct proofs in the case." All facts tending to elucidate the matter under discussion are admissible, and need not directly tend to show guilt: *State v. Reno*, 67 Iowa, 587,

25 N. W. 818; *McCann v. State*, 21 Miss. (13 Smedes & M.) 471; *Moore v. State*, 2 Ohio St. 500; *Johnson v. Commonwealth*, 115 Pa. St. 369, 9 Atl. 78. So the political position of the parties, in most cases foreign to the issue, may, in cases of circumstantial evidence, form part of the chain, and become legitimate proof: *Smith v. Brazelton*, 48 Tenn. (1 Heisk.) 44, 2 Am. Rep. 678. And an exclamation by the defendant: "Now I have found your hiding place," is admissible as a circumstance going to show the accused's feeling toward the deceased, where both were seen talking together and accused walked to a large box and made the above remark; and it also indicated that the deceased had done something the defendant disapproved of: *Hamblin v. State*, 41 Tex. Cr. App. 135, 50 S. W. 1019, 51 S. W. 1111. Motives, declarations, preparations for committing the crime, and the like are admissible: *People v. Morrow*, 60 Cal. 142, *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244; as are also falsehoods uttered by way of exculpation: *State v. Benner*, 64 Me. 267; attempts to cast suspicion without just cause on others: *Commonwealth v. Webster* 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711; the fact that the accused might, if innocent, explain away the circumstances and does not: *Young v. State*, 95 Ga. 456, 20 S. E. 270; *Wells v. State*, 99 Ga. 206, 24 S. E. 853. The fact that the defendant had an opportunity to place the stolen goods where they were found soon after the commission of the crime is admissible as a circumstance, and the fact that other persons had the same opportunity only weakens the force of such circumstance, but does not render it incompetent as criminating evidence: *Padfield v. People*, 146 Ill. 660, 35 N. E. 469. That it is error to instruct the jury that suspicious circumstances, if unexplained, are sufficient to overcome the presumption of innocence, see *State v. Banks*, 43 Iowa, 595. Where no motive is shown, it is a circumstance in favor of the prisoner, but it is not error for the court to refuse to charge that the absence of such motive "ought to operate strongly" in his favor, that being a matter for the jury alone to determine: *Clough v. State*, 7 Neb. 320. A crime may be clearly established, and no motive even discovered: *Sutton v. Commonwealth*, 85 Va. 128, 7 S. E. 323.

If the defendant claims to have been at another place when the crime was committed, any circumstances which will tend to fix the time he was at such other place are admissible: *People v. McCrea*, 32 Cal. 98.

While the courts are liberal in admitting in evidence whatever facts may aid in investigating the crime, this does not mean that anything may be given in evidence, and all evidence of facts should be excluded which are incapable of forming any reasonable presumption or inference as to the principal fact or matter in dispute: *Rye v. State*, 8 Tex. App. 153; and whether the circumstantial evidence in a particular case be considered either as links, depending

on each other, or independent facts all pointing in the same direction, every individual circumstance must in itself at least tend to prove the defendant's guilt before it can be admitted as evidence: *State v. Austin*, 129 N. C. 534, 40 S. E. 4.

b. Evidence of Flight.—Two of the most common circumstances which are admissible as tending to show guilt are flight and recent possession of stolen goods. If not explained, flight is a circumstance against the accused to be considered by the jury in connection with all the other evidence: *Hudson v. State*, 101 Ga. 520, 28 S. E. 1010; *State v. Thomas*, 58 Kan. 805, 51 Pac. 288; but it is not conclusive of guilt: *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592. It is inadmissible except in cases of circumstantial evidence: *Williams v. State*, 43 Tex. 182, 23 Am. Rep. 590.

The defendant, however, cannot introduce evidence of an opportunity to escape, or refusal to flee, as that would be allowing him to make evidence for himself: *Pate v. State*, 94 Ala. 14, 10 South. 665; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625.

Attempts to bribe a jailer, attempts to break jail, possession of concealed weapons for that purpose may all be shown as relevant circumstances: *Funk v. United States*, 16 App. D. C. 478.

c. Evidence of Possession of Stolen Goods.—The possession of stolen goods is a circumstance of guilt: *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033; but it weakens with the lapse of time, and may scarcely be of any weight if others besides the accused have had equal access with himself to the place where it is discovered: *Gablick v. People*, 40 Mich. 22. The mere possession of stolen goods alone in connection with a burglary does not in itself create a presumption or amount to prima facie proof that the possessor is guilty of the burglary; but where, independent of the mere possession, the evidence tends to show that a burglary was committed by someone, and that the theft of the goods was accomplished at the same time and by means of such burglary, proof of possession will be sufficient to sustain a conviction for burglary: *State v. Brady (Iowa)*, 91 N. W. 801. Where a burglary was committed, the property taken found in the possession of the accused, who could give no satisfactory explanation of it, and fled from justice, it was held sufficient to sustain a conviction of burglary: *Houser v. State*, 58 Ga. 78.

VIII. What May be Established by Circumstantial Evidence.

a. Malice and Intent.—In the absence of statutory enactment to the contrary, it may be stated as a general rule that whatever may be established by direct evidence may be also established by circumstantial. In fact, this latter kind of evidence may be said alone to be available in proving an element of crime, such as malice or intent, existing only in the mind of the perpetrator of the deed.

Malice, like any other fact, must be proved, and this may be done by circumstances from which the jury may infer it: *Walker v.*

Commonwealth, 7 Ky. Law Rep. 44; State v. Lane, 64 Mo. 319; Gomez v. State, 15 Tex. App. 327, in which case, speaking of proving express malice, it is said: "All that is required is that the evidence of its existence be such as might be reasonably sufficient to satisfy the minds of the jury that it did in fact exist. Such proof may be entirely circumstantial, and may be deduced from evidence 'of the cool, calm and circumspect deportment and bearing of the party when the act is done, and immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passions; the nature and character of the act done; the instrument used, as well as the manner in which the murder is committed': Farrar v. State, 42 Tex. 465; Gaitan v. State, 11 Tex. App. 544." See, also, State v. Fisher, 1 Penne. (Del.) 303, 41 Atl. 208; Roberts v. People, 19 Mich. 401. The principle that the circumstances, to warrant a conviction, must exclude every reasonable hypothesis, other than the guilt of the defendant, applies only to proof of the act, and not of the intent. So where the act is proved by direct testimony, the intent only remaining to be established, this may be inferred from the circumstances, and the above rule does not apply: Jones v. State, 34 Tex. Cr. App. 490, 30 S. W. 1059, 31 S. W. 664.

That the motive for a crime may be inferred from circumstances, see State v. Smith, 102 Iowa, 656, 72 N. W. 279; Webb v. State, 73 Miss. 456, 19 South. 238. So the condition of a body, indicating that rape was intended, is admissible as a circumstance to show motive: Robinson v. State, 114 Ga. 56, 39 S. E. 862.

b. **Miscellaneous Facts.**—The wide range of circumstantial evidence may be noted by the following cases, where such evidence was held competent to establish many varying facts, such as the date of an occurrence: Sherburne v. Brown, 43 N. H. 80; age: State v. Thompson, 155 Mo. 300, 55 S. W. 1013; discretion: Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905, 7 S. W. 328; notoriety as to improvements of land: Crow v. Harrod, 3 Ky. (Hard.) 443. In a prosecution for the sale of intoxicating liquor, it is not necessary to show by direct testimony that the liquor sold was intoxicating, but it may be shown by circumstances: Dant v. State, 83 Ind. 60; and they may also warrant the inference that a certain substance sold was poison: Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770.

c. **Venue.**—The doctrine of reasonable doubt does not apply to the merely jurisdictional fact of venue: Achtenberg v. State, 8 Tex. App. 463; Cox v. State, 28 Tex. App. 92, 12 S. W. 493; and it may be established by circumstantial evidence, and inferred from other facts, direct proof not being necessary: Tinney v. State, 111 Ala. 74, 20 South. 507; Brooke v. People, 23 Colo. 375, 48 Pac. 502; Croy

v. State, 32 Ind. 384; Burst v. State, 89 Ind. 133; Harlan v. State, 134 Ind. 339, 33 N. E. 1102; State v. Thomas, 58 Kan. 805, 51 Pac. 228; State v. West, 69 Mo. 401, 33 Am. Rep. 506; State v. Sanders, 106 Mo. 188, 17 S. W. 223; State v. Dent, 170 Mo. 398, 70 S. W. 881; State v. Snyder, 44 Mo. App. 429; State v. Roach, 64 Mo. App. 413; Weinecke v. State, 34 Neb. 14, 51 N. W. 307; Harvey v. Territory, 11 Okla. 156, 65 Pac. 837; State v. Gossett, 9 Rich. (S. C.) 428; State v. Chaney, 9 Rich. (S. O.) 438; City of Florence v. Berry, 61 S. O. 237, 39 S. E. 389; Deggs v. State, 7 Tex. App. 359; Hoffman v. State, 12 Tex. App. 406; Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408; Kugadt v. State, 38 Tex. Cr. App. 681, 44 S. W. 989; Rex v. Burdett, 4 Barn. & Ald. 95. Where in the trial of one charged with murder, in the superior court of Franklin county, Georgia, it appeared from the evidence that the accused killed the deceased at the house of the former on the place of a named person in Franklin county, it was sufficiently shown that the homicide occurred in Franklin county, Georgia; and such evidence excluded any legitimate inference that the offense was committed in Franklin county, North Carolina, though situated not far from the county of the same name in Georgia: Knox v. State, 114 Ga. 272, 40 S. E. 233.

In Franklin v. State, 64 Tenn. (5 Baxt.) 613, however, it was held that the proof of venue must not be left to inference or construction. In that case a homicide was proven to have been committed seventy-five yards or more from the place of the prisoner's arrest, and the county of the arrest was proven, but the proof of venue was held insufficient. See, also, Sedberry v. State, 14 Tex. App. 233, to the effect that inferences alone cannot be indulged to establish the venue of an offense. This latter decision probably means that there must be some facts from which the venue may be established, and that it cannot be guessed at or inferred from nothing; that is, that the mere fact that an offense is charged as having been committed at a certain place is not sufficient to establish the venue, but some proof must be made of the act. If it means to decide that venue cannot be established by inference from facts proven in the case, it is counter to a great many decisions of that state, and the overwhelming weight of authority.

d. *Corpus Delicti*.—The general rule is that the corpus delicti may be established by circumstantial evidence: State v. Taylor, 1 Houst. O. C. (Del.) 436; Anderson v. State, 24 Fla. 139, 3 South. 884; Holland v. State, 39 Fla. 178, 22 South. 298; State v. Keeler, 28 Iowa, 551; State v. Minor, 106 Iowa, 642, 77 N. W. 330; State v. Novak, 109 Iowa, 717, 79 N. W. 465; State v. Winner, 17 Kan. 298; State v. Hunter, 50 Kan. 302, 32 Pac. 37; Johnson v. Commonwealth, 81 Ky. 325; Brown v. State, 1 Tex. App. 154; Timmerman v. Territory, 3 Wash. Ter. 445, 17 Pac. 624; Buel v. State, 104 Wis. 132, 80 N. W. 78. See, also, Bloomer v. People, 1 Abb. Dec. 146.

The corpus delicti, or body of the offense charged, has two components—death as the result, and the criminal agency of another as the means. It is only where death by criminal violence has been proved either by the direct testimony of witnesses who have seen and identified the body, or where proof of the death is so strong as to produce the full assurance of moral certainty, that the criminal agency can be established by circumstantial evidence: *Pitts v. State*, 43 Miss. 472; *Smith v. Commonwealth*, 21 Gratt. (Va.) 809.

Judge Story, in *United States v. Gibert*, 2 Sum. 19, Fed. Cas. No. 15,204, mentioning certain cases which had been cited to show the danger of relying on circumstantial evidence, said: "They are brought to establish these propositions on trials on indictments for murder (for they are all of this sort): 1. That there ought to be no conviction for murder, unless the murdered body is actually found; 2. That men have been convicted of murder on false testimony. The first proposition certainly cannot be admitted as correct in point of common reason, or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely, if ever, found; and a more complete encouragement and protection for the worst offenses of this sort could not be invented, than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

Lord Hale at one time laid down the rule that in cases of homicide, no conviction should be had unless the fact were proved to be done or at least the body found. This rule was commented upon and approved in *Ruloff v. People*, 18 N. Y. 179, the court saying: "This rule is not founded in a denial of the force of circumstantial evidence, but in the danger of allowing any but unequivocal and certain proof that someone is dead to be the ground on which, by the interpretation of circumstances of suspicion, an accused person is to be convicted of murder."

This rule has been discussed and disapproved, however, in the supreme courts of other states: *Edmonds v. State*, 34 Ark. 720; *State v. Williams*, 52 N. C. (7 Jones) 446, 78 Am. Dec. 248.

In *State v. Calder*, 23 Mont. 504, 59 Pac. 903, which was a murder case, the identity of the person alleged to have been killed was proved by the direct testimony of an accomplice, who was an eye-witness, and assisted in disposing of the body by burning it and throwing the ashes into a river, corroborated by circumstantial evidence. The death of a human being was directly proved by the identification of teeth and charred bones found in a river near the point where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. This evidence was held sufficient to satisfy the requirements of a statute providing that the death of the person alleged to have been killed must be

established by direct proof, as an independent fact, direct proof being defined by statute as that which proves the fact in dispute, without an inference or presumption.

Where the corpus delicti is attempted to be shown by circumstantial evidence, it must be so established as to exclude positively all uncertainty or doubt from the minds of the jury: *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312.

e. Corroboration.

1. **Of Accomplice.**—Not only may circumstantial evidence be used to establish the existence of a certain state of facts, but it is also competent to corroborate other testimony, as that of an accomplice, whose uncorroborated word would not be of sufficient force to convict: *State v. Stanley*, 48 Iowa, 221. By an Iowa statute, the corroboration of the testimony of an accomplice must not merely relate to the commission of the offense or the circumstances thereof, but must tend to connect the defendant with the commission of the criminal act: *State v. Thornton*, 26 Iowa, 79. Where a statute declares the extent of corroboration of an accomplice to be "other evidence tending to connect the defendant with the offense committed," this does not require that the different matters testified to by the accomplice are to be supported, each one, by other testimony, to the same isolated facts, but it must tend to connect the defendant with the offense committed: *Myers v. State*, 7 Tex. App. 640.

2. **Of Prosecuting Witness.**—Where corroboration of the testimony of the complaining witness is required in cases of seduction, circumstantial evidence is admissible to that end, as positive proof, from the very nature of the offense, can hardly ever be adduced: *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837, citing *State v. Timmens*, 4 Minn. 325. So in a criminal prosecution of this character it is sufficient corroboration to introduce evidence that she was alone with the prisoner at the time she charged the offense was committed, as to her condition and appearance after it, as to his attentions and familiarities, and as to his solicitude during her sickness immediately following the alleged offense: *Boyce v. People*, 55 N. Y. 644.

IX. Circumstantial Evidence as Secondary Evidence.

The rule of law requiring the production of the best evidence which the nature of the case admits applies to circumstantial evidence, and it ought never to be relied on where direct testimony is withheld, the latter being considered primary, the former secondary: *Chisholm v. State*, 45 Ala. 66; *McCandless v. State*, 42 Tex. Cr. App. 655, 62 S. W. 745; *Porter v. State*, 1 Tex. App. 394; and when it is disclosed that direct evidence of a material fact is probably in existence, circumstantial evidence of that fact cannot be

resorted to without accounting for the absence of the direct evidence: *Gabrielsky v. State*, 13 Tex. App. 428, citing *Wilson v. State*, 12 Tex. App. 481. Where, however, witnesses who could give positive testimony are beyond the jurisdiction of the court, the prosecution need not produce it, and the fact in dispute may be shown by circumstantial evidence: *Scott v. State*, 19 Tex. App. 325. See, also, *Clayton v. State*, 15 Tex. App. 348.

In *Coleman v. State*, 87 Ala. 14, 6 South. 290, the court refused to instruct the jury that circumstantial evidence ought to exclude a rational probability of innocence, and a conviction ought not to be had on circumstantial evidence, when direct and positive evidence is attainable, as being misleading, when there was some direct and positive evidence, and the record did not show that any other was attainable; and the refusal so to charge was held not error.

Where the court refused to instruct that if the jury should find from the evidence that there were other sources, not explained, and other facts and circumstances, not developed, by the state, which would have shed light upon the case, they should acquit the defendant, it was held not erroneous: *Lopez v. State* (Tex. Cr. App.), 20 S. W. 395, the court saying: "Under such a rule there would seldom be a conviction, for it would demand the production of every witness and every shred of evidence in every case. There is a rule which excludes testimony which itself shows there is better evidence which is withheld or not accounted for, but there is no rule that demands the greatest amount of evidence procurable. There is not a single fact in this case going to show that absent witnesses would have testified differently, or to any additional inculpatory fact: *Rodriguez v. State*, 5 Tex. App. 256."

An exception to the general rule exists where the eye-witnesses are unfriendly to the state, and circumstantial evidence may in such a case be introduced: *McCandless v. State*, 42 Tex. Cr. App. 655, 62 S. W. 745; and the reason for this is there stated as follows: "Now, if the state can establish a strong case of guilt against defendant by circumstantial evidence, but there are eye-witnesses, who are unfriendly to it, shall it be compelled, in the first instance, to introduce appellant's witnesses, and thus handicap itself throughout the trial by adopting them as its own, thus giving appellant the opportunity to cross-examine his own witnesses, and treating them throughout as state's witnesses, and rendering it impossible afterward for the state to impeach such witnesses? We think not."

X. Instructions on Circumstantial Evidence.

a. **Duty of Court to Charge Thereon.**—Instructions as to the law of circumstantial evidence present a most important question, as it is upon that point that a majority of the adjudicated cases are taken to the higher courts, and it will be necessary to examine this

branch of the subject separately, although embodying to a great extent, principles of substantive law.

In order to secure justice it is the duty of the trial judge, even without request, to instruct the jury as to this kind of evidence, where the case is based entirely thereon: *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528; *State v. Elsham*, 70 Iowa, 531, 31 N. W. 66; *State v. Brady* (Iowa), 91 N. W. 801; *McDowell v. Commonwealth*, 4 Ky. Law Rep. 353; *Territory v. Lerma*, 8 N. Mex. 566, 46 Pac. 16; *Struckman v. State*, 7 Tex. App. 581; *Barr v. State*, 10 Tex. App. 507; and a failure to charge thereon is reversible error: *Polanka v. State*, 33 Tex. Cr. App. 634, 28 S. W. 541; *Willard v. State*, 26 Tex. App. 126, 9 S. W. 358; *Hanks v. State* (Tex. Cr. App.), 56 S. W. 922; whether excepted to at the proper time or not: *Conner v. State*, 17 Tex. App. 1. But it has been held that while ordinarily it is the duty of the judge to charge as to the degree of certainty required to sustain a conviction where circumstantial evidence alone is relied on, still, in such a case, where the evidence, though circumstantial, is full and satisfactory, without serious conflict, and clearly shows the guilt of the accused, failure to do so will not require awarding a new trial: *Richards v. State*, 102 Ga. 569, 27 S. E. 726; *Jones v. State*, 31 S. E. (Ga.) 574.

b. Where not Wholly Circumstantial.

1. **Where Positive Testimony in Evidence.**—In *State v. Andrews*, 62 Kan. 207, 61 Pac. 808, the court held that the jury should have been instructed, as requested by defendant, upon circumstantial evidence, where the case was made up partly of such evidence and partly of direct testimony, as the jury might base their verdict entirely on the former, disregarding the latter. The weight of authority, however, is against this case, and the general rule is that where the evidence is not entirely circumstantial the court need not charge thereon: *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *People v. Bonds*, 1 Nev. 33; *People v. Kaatz*, 3 Park. Cr. (N. Y.) 129; *Barnards v. State*, 88 Tenn. 183, 12 S. W. 431; *Irvin v. State*, 7 Tex. App. 109; *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585; *Heard v. State*, 24 Tex. App. 103, 5 S. W. 846; *Hayes v. State*, 30 Tex. App. 404, 17 S. W. 940; *Brown v. State* (Tex. Cr. App.), 43 S. W. 986; *Glover v. State* (Tex. Cr. App.), 46 S. W. 824; *Nite v. State*, 41 Tex. Cr. App. 340, 54 S. W. 763. So where the evidence of the prosecution is both direct and circumstantial, a charge requested as to the sufficiency of circumstantial evidence to authorize a conviction, ignoring direct evidence, is properly refused: *Cotton v. State*, 87 Ala. 75, 6 South. 396; and the court need not instruct thereon where the main evidence of the prosecution was the direct proof of an eye-witness: *People v. Burns*, 121 Cal. 529, 53 Pac. 1096. See, also, *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586.

Any direct testimony will serve to dispense with the necessity of an instruction on circumstantial evidence. If the testimony be positive, even though that of an accomplice, it is sufficient: *Kidwell v. State*, 35 Tex. Cr. App. 264, 33 S. W. 342; *Williams v. State* (Tex. Cr. App.), 45 S. W. 494; *Rios v. State*, 39 Tex. Cr. App. 675, 47 S. W. 987; and where the prosecution relies upon the evidence of an accomplice as well as upon circumstantial evidence, it is not error to refuse an instruction assuming it a case of circumstantial evidence only: *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588.

2. **Confessions.**—The confession of the accused, being direct evidence, will also dispense with the need of a charge on circumstantial: *Green v. State*, 97 Ala. 59, 12 South. 416, 15 South. 242; *Perry v. State*, 110 Ga. 234, 36 S. E. 781; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066; *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905, 7 S. W. 328; *White v. State*, 32 Tex. Cr. App. 625, 25 S. W. 784; *Albritton v. State* (Tex. Cr. App.), 26 S. W. 398; *White v. State*, 40 Tex. Cr. App. 366, 50 S. W. 705; *Ricks v. State*, 41 Tex. Cr. App. 676, 56 S. W. 928; *Carmona v. State* (Tex. Cr. App.), 65 S. W. 928. And the fact that such confession was made to an accomplice does not alter the rule: *Wampler v. State*, 28 Tex. App. 352, 13 S. W. 144. Nor is any charge thereon necessary where, on a trial for burglary, the defendant admits entering the house, claiming he had a right to do so, and was seen coming out: *Monceveis v. State* (Tex. Cr. App.), 70 S. W. 94.

The confession, however, must be of the very crime charged. So where the defendant is accused of the burglary of a house in which corn is stored, and he confesses to the theft of the corn, this is not sufficient to dispense with a charge on circumstantial evidence, requested by the defendant: *Beason v. State*, 63 S. W. 633, 43 Tex. Cr. App. 442, 67 S. W. 96, the court saying when the case was first up on appeal: "While it is true a confession to the burglary would take the case out of the rule, yet a confession of theft alone, under the circumstances of this case, would not make the charge of burglary a case of positive evidence. The possession of the corn recently after it was stolen would only be a circumstance pointing to the burglary, for the corn may have been stolen, and yet no burglary committed."

In *Eckert v. State*, 9 Tex. App. 105, a trial for an assault with intent to murder, it was proved that the person on whom the alleged assault was committed was, while riding a sorrel horse, shot by some unknown person, and that later on the same day the defendant, who had been in pursuit of a sorrel horse which had been stolen from him, stated that he had shot after the man that rode his horse. This statement was held not a confession, but was itself in the nature of

circumstantial evidence, as only by inference was it proved that the man assaulted was the one to whom the defendant referred.

In a charge for illegally altering a brand upon an animal, where the defendant admitted changing the brand on a certain lost animal, but the identity of the animal was dependent on circumstantial testimony, it was held error for the court to fail to charge on circumstantial evidence: *Childers v. State*, 37 Tex. Cr. App. 392, 35 S. W. 654.

Where the only question is the intent, the defendant confessing the act, no charge on circumstantial evidence is necessary: *Houston v. State* (Tex. Cr. App.), 47 S. W. 468; *Red v. State* (Tex. Cr. App.), 53 S. W. 618; *Roberts v. State* (Tex. Cr. App.), 70 S. W. 423. Nor need a charge thereon be given where only the venue is in dispute, and not the commission of the offense: *Stedham v. State*, 40 Tex. Cr. App. 43, 48 S. W. 177. But it should where all the evidence is circumstantial, although the corpus delicti is proved by direct testimony: *Eckert v. State*, 9 Tex. App. 105.

3. **Possession of Stolen Property.**—As before remarked, wherever the case is one depending solely upon circumstantial evidence, it is prejudicial error for the judge to omit to charge the law relating thereto. All cases relying only upon the possession of stolen goods come within this class, such possession not being positive evidence, but at most a circumstance tending to establish guilt; and the defendant is entitled to have a charge on such evidence given: *Sullivan v. State*, 18 Tex. App. 623; *Boyd v. State*, 24 Tex. App. 570, 5 Am. St. Rep. 908, 6 S. W. 853; *Alderman v. State* (Tex. Cr. App.), 23 S. W. 685; *Wallace v. State* (Tex. Cr. App.), 66 S. W. 1102; *Cortez v. State* (Tex. Cr. App.), 74 S. W. 907.

Where the accused was seen to have driven a cow, alleged to have been stolen, into his field, and its beef and hide found at defendant's house, if the witness did not see and identify the hide as of the cow he had seen the defendant drive into his field, a failure to instruct on the law of circumstantial evidence is error: *Smith v. State* (Tex. Civ. App.), 12 S. W. 869.

4. **Need not Charge Where Defendant in Juxtaposition to the Offense.**—There is one exception to the rule that instructions as to circumstantial evidence must be given, and that is where, although the act was not seen, the proximity and juxtaposition of the defendant make it absolutely certain that he committed the deed; and in the absence of an exception to the omission to charge, a reversal will not be allowed: *Poston v. State* (Tex. Cr. App.), 35 S. W. 656. So where on a trial for murder committed by two parties, an accomplice, who testified for the state, was, at the time the fatal blow was given, near and in juxtaposition to the act, though he may not have seen which one of the two parties inflicted the blows, it being dark, it is sufficient to dispense with a charge of circumstantial evidence:

Kidwell v. State, 35 Tex. Cr. App. 264, 33 S. W. 342. See, also, **Adams v. State**, 34 Tex. Cr. App. 470, 31 S. W. 372; **Crews v. State**, 34 Tex. Cr. App. 533, 31 S. W. 373.

Where the facts are in doubt as to whether the accused was in such juxtaposition with the main fact, it is the safer and sounder rule to charge in regard to circumstantial evidence: **Trejo v. State** (Tex. Cr. App.), 74 S. W. 546.

Where the defendant, accused of stealing a cow, was in possession of it three days after it was missed by the owner, about a block away from the owner's house, and was about to turn it loose on the prairie, this did not show that the accused was in such juxtaposition to the fact of the taking as not to require a charge on circumstantial evidence: **Davis v. State** (Tex. Cr. App.), 74 S. W. 544. For a similar case see **Montgomery v. State** (Tex. Cr. App.), 20 S. W. 926.

c. **Where Proof is Direct.**—Where the proof is direct and positive, it is, of course, not erroneous to refuse to charge on circumstantial evidence: **Welch v. State**, 124 Ala. 41, 27 South. 307; **Mitchell v. State**, 129 Ala. 23, 30 South. 348; **Purvis v. State**, 71 Miss. 706, 14 South. 268; **State v. Fairlamb**, 121 Mo. 137, 25 S. W. 895; **Ellis v. State**, 33 Tex. Cr. App. 86, 24 S. W. 894; **Baxter v. State** (Tex. Cr. App.), 43 S. W. 87; **Leftwich v. State** (Tex. Cr. App.), 55 S. W. 571; **Augustine v. State**, 41 Tex. Cr. App. 59, 96 Am. St. Rep. 765, 52 S. W. 77; **Dunn v. State**, 43 Tex. Cr. App. 25, 63 S. W. 571.

d. **Instructions not Required by the Evidence.**—It is not error to charge on circumstantial evidence, where such is the character of the testimony: **Rountree v. State** (Tex. Cr. App.), 58 S. W. 106. But where the question who the guilty party is depends wholly on circumstantial evidence, it is error to instruct the jury that the case is not founded entirely upon such evidence, but that there is both positive and circumstantial: **Simmons v. State**, 85 Ga. 224, 11 S. E. 555. An instruction as to circumstantial evidence, if there is none in the case, is harmless: **Reynolds v. State**, 147 Ind. 3, 46 N. E. 31; and though such a charge was not required, it does not follow that it is illegal, and is not reversible error, especially if it is beneficial to the accused: **Surrell v. State**, 29 Tex. App. 321, 15 S. W. 816.

e. Form of Instructions.

1. **No Prescribed Form.**—In charging the jury on circumstantial evidence, there is no prescribed form to be followed, and if the ideas conveyed are correct and so expressed as to be understood by the jury, it is sufficient: **Rye v. State**, 8 Tex. App. 153; **Chitister v. State**, 33 Tex. Cr. App. 635, 28 S. W. 683; **Galloway v. State** (Tex. Cr. App.), 70 S. W. 211; **McCoy v. State** (Tex. Cr. App.), 73 S. W. 1057. It is better, however, for trial courts to abide by approved instructions on this subject, and they should not attempt to change them: **Turner v. State**, 72 Tenn. (4 Lea) 206; **McIver v. State** (Tex. Cr. App.), 60 S. W. 50.

2. Wording of Instructions.—The importance of the fact that circumstantial evidence must not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis, has already been adverted to, and it figures largely in instructions given in criminal cases based upon evidence of that character.

In the first place it is necessary to note that, while the word "hypothesis" is most often employed, synonyms of that word may be used in stating the rule, as "conclusion": *State v. Willingham*, 33 La. Ann. 537; "supposition" or "assumption": *Blackburn v. State*, 86 Ala. 595, 6 South. 96; *State v. Davenport*, 38 S. C. 348, 17 S. El. 37; *State v. Harrass*, 25 Wash. 416, 65 Pac. 774. The word "supposition," however, is not commended in use in instructions: *Baldwin v. State*, 111 Ala. 11, 20 South. 528.

f. Instruction on Excluding Every Other Reasonable Hypothesis but Guilt.—The defendant is entitled to an instruction embodying this principle of law: *Riley v. State*, 88 Ala. 188, 7 South. 104, 88 Ala. 193, 7 South. 149; *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528; *Wantland v. State*, 145 Ind. 38, 43 N. E. 931; *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *State v. Woolard*, 111 Mo. 248, 20 S. W. 27; *Lawless v. State*, 72 Tenn. (4 Lea) 173; *Harrison v. State*, 6 Tex. App. 42; *Smith v. State*, 35 Tex. Cr. App. 618, 33 S. W. 339, 34 S. W. 960. It is the better practice to state it in full; and an instruction that a conviction may be had on circumstantial evidence, without any other instructions, is dangerous: *State v. Sasseen*, 75 Mo. App. 197. A charge omitting that the circumstances should exclude every reasonable hypothesis but that of guilt is insufficient: *Bookser v. State*, 26 Tex. App. 593, 10 S. W. 219; *Harris v. State*, 34 Tex. Cr. App. 494, 31 S. W. 388; and its omission is not supplied by the ordinary instruction as to reasonable doubt: *Hunt v. State*, 7 Tex. App. 212. But see *Jones v. State*, 61 Ark. 38, 32 S. W. 81. The charge should not be given that circumstantial evidence is insufficient to convict when, conceding all to be proved that the evidence tends to prove, some other hypothesis than that of the defendant's guilt may be true: *People v. Strong*, 30 Cal. 151; and it is erroneous to instruct that if the hypothesis of guilt consists with all the facts proven and accounts for their existence, the jury should convict, as it may still fall short of that convincing proof necessary to convict on circumstantial evidence: *Pope v. State*, 56 Miss. 790. An instruction that before the jury could convict on circumstantial evidence, it must be of such character and weight as to exclude all reasonable hypothesis of defendant's innocence, is too meager to authorize a conviction, and is not a safe guide to the jury: *State v. Taylor*, 111 Mo. 538, 20 S. W. 239. But in *State v. House*, 108 Iowa, 68, 78 N. W. 859, it was held that where the court correctly charged as to circumstantial evidence, but omitted that it should exclude every reasonable hypothesis, there was no error in the absence of a

request therefor. Where a charge on circumstantial evidence, though not complete, is given, if a fuller explanation is desired, a request should be made: *Robinson v. State*, 114 Ga. 56, 39 S. E. 862.

An instruction that circumstantial evidence is not only legal evidence, but also that a well-connected train of circumstances is as conclusive of a fact as is the greatest array of positive evidence, coupled with one that it should exclude every reasonable hypothesis but guilt is correct: *Gantling v. State*, 40 Fla. 237, 23 South. 857. In the following cases instructions on this principle of the law have been affirmed: *Bryan v. State*, 74 Ga. 393; *Commonwealth v. Annis*, 81 Mass. (15 Gray) 197; *State v. David*, 131 Mo. 380, 33 S. W. 28; *Cunningham v. State*, 56 Neb. 691, 77 N. W. 60; *Baldez v. State*, 37 Tex. Cr. App. 413, 35 S. W. 664; *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210. In *Padfield v. People*, 146 Ill. 660, 35 N. C. 469, the court held that it was not error to refuse to instruct that the jury should acquit if there was any reasonable theory by which the defendant might not be guilty, as wholly ignoring the fact that the theory must be consistent with the evidence in the case.

Immaterial changes in the wording of instructions on circumstantial evidence are not erroneous. So, where the court charges that "all facts and circumstances" must be inconsistent with any reasonable theory of innocence, it is not objectionable because it did not say "each fact and circumstance": *Galloway v. State* (Tex. Cr. App.) 70 S. W. 211; and it is not error for the trial judge to strike out "absolute" before the words "moral certainty," and "all," in the sentence that the circumstances must all concur to show his guilt: *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

g. Instruction That Defendant Alone Guilty.—Where the court has correctly instructed as to the exclusion of every reasonable hypothesis, it need not state that the jury must believe that he, and no other person committed the offense: *Bennett v. State*, 39 Tex. Cr. App. 639, 48 S. W. 61; *Ramirez v. State*, 43 Tex. Cr. App. 455, 66 S. W. 1101; *Bell v. State* (Tex. Cr. App.), 71 S. W. 24. In *Crow v. State*, 37 Tex. Cr. App. 295, 39 S. W. 574, the instruction given was that the circumstantial testimony must be of a conclusive nature, leading to a satisfactory conclusion and producing a reasonable and moral certainty that the defendant, and no other person, committed the offense charged. This was held sufficient, being considered equivalent to instructing them that it must be inconsistent with defendant's innocence. The court added, however, that this charge might not be correct in all cases. In *Davis v. State* (Tex. Cr. App.), 54 S. W. 583, it was held insufficient to charge that theft might be established by circumstances, if sufficient to establish beyond a reasonable doubt that the accused, and not some other person, took the property, if taken from the owner, this equaling no charge on circumstantial evidence.

Where it is shown that the accused and some other person are acting together as principals in the commission of a crime, the failure to instruct that the accused and no other person committed the crime was correct, the court charging that the circumstances must lead to a moral certainty that the accused, or the accused acting with some other person, committed the offense charged: *Boersh v. State* (Tex. Cr. App.), 62 S. W. 1060.

h. Instruction on the Proof of Each Separate Circumstance.—The weight and importance of each individual circumstance going to make up the body of the evidence having been discussed in VI, a, herein, it becomes necessary to add only a few words regarding instructions involving them. In *Harrison v. State*, 6 Tex. App. 42, it was held error for the court to refuse to instruct that each fact relied on must be proved by the same weight as if it were the main fact in issue; that they must be consistent with each other, and with the main fact to be proved. But in *State v. Rome*, 64 Conn. 329, 30 Atl. 57, it was considered sufficient to tell the jury that the proof should not only be consistent with the defendant's guilt, but every other rational conclusion, and the judge need not add that every circumstance must be proved beyond a reasonable doubt. As to a sufficient instruction as to proving each circumstance, see *State v. Asbell*, 57 Kan. 398, 46 Pac. 770.

i. Circumstantial Evidence and the Presumption of Innocence.—In charging the law of circumstantial evidence, the court should be careful not to reverse the presumption of innocence of the accused. This is well illustrated in *McMillan v. State*, 7 Tex. App. 142, where the following charge to the jury was complained of: "Can the facts and circumstances you find from the evidence to be true exist, and can you, in view of these facts and circumstances, reasonably conclude that the defendant is innocent? If so, you should find him not guilty; otherwise you should find him guilty." This the court held erroneous, saying: "In the shape it was presented to the jury it reversed the rule of law, and devolved upon the jury the necessity of reaching a conclusion that the defendant was innocent before they could find him not guilty. This is never incumbent on a jury in a criminal prosecution. The law clothes the prisoner with the presumption of innocence, which continues throughout the trial and until the return of a verdict of conviction. It is never exacted of a jury that they should find the defendant innocent of the crime imputed to him, but the burden rests upon the prosecution throughout the trial to establish his guilt to their satisfaction. They need never conclude, reasonably or otherwise, that the defendant is innocent, but their functions are at an end when they reach a conclusion that the evidence fails to satisfy their minds that he is guilty under the law."

Having charged the jury affirmatively as to what they must believe in order to convict, the judge should not charge negatively on

the other side; and an instruction that if the jury could not account for nor explain the facts and circumstances detailed before them upon any reasonable ground consistent with the defendant's innocence, they should convict, should be omitted: *Estep v. State*, 9 Tex. App. 366. A charge is erroneous which states that the jury should convict unless they could reconcile all the suspicious facts proved with the innocence of the defendant, for the burden is on the state to prove his guilt, and not on the defendant to explain suspicious circumstances: *Buchanan v. State*, 55 Ala. 154.

j. Miscellaneous Erroneous Instructions.—An instruction that “as mathematical or absolute certainty is seldom to be obtained in human affairs, reason and public utility require that jurors, as well as all mankind, in forming their opinion of facts, should be regulated by the superior number of probabilities on the one side or the other, whether the amount of these probabilities be expressed in words, or arguments, or by figures and numbers,” is prejudicial error, and is not cured by the giving of further instructions correctly stating the law: *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420. In *Otmer v. People*, 76 Ill. 149, the court, after saying that the jury should convict if they believed beyond a reasonable doubt, that the accused committed the offense charged, added that it mattered not that such evidence was made up of facts and circumstances, provided the jury believed such facts and circumstances pointing to his guilt to have been proven beyond a reasonable doubt. The court condemned this in the following words: “The jury may have believed the facts and circumstances pointing to defendant's guilt were proven, and yet they may not have regarded the facts and circumstances so proven sufficient to satisfy their understanding and conscience of the defendant's guilt, but notwithstanding this, they were told by the instruction it was their duty to convict.

“Before the jury could be justified in returning a verdict of guilty, they should have believed the facts and circumstances pointing to defendant's guilt proven beyond a reasonable doubt, and that these facts and circumstances in proof were sufficient to establish upon the defendant the crime of which he was charged, beyond such doubt.”

An instruction that if the facts proved by a preponderance of evidence satisfied the jury as to the guilt of the prisoner beyond a reasonable doubt, it was entitled to the same weight as direct testimony, is erroneous, as that would allow a conviction in criminal cases upon a preponderance of the evidence: *Gill v. State*, 59 Ark. 422, 27 S. W. 598. It is incorrect to charge the jury that the degree of certainty which the law requires and which will justify them in convicting on circumstantial evidence is that to which they would arrive in their own grave and important concerns: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267, 18 South. 182.

k. Instructions Properly Refused.

1. **Argumentative and Misleading.**—The court is, of course, justified in refusing to give argumentative or misleading instructions to the jury. So it is not erroneous to refuse to charge that the humane provision of the law is that there shall not be a conviction on circumstantial evidence unless to a moral certainty it excludes every other reasonable hypothesis but guilt, such being argumentative: *Shepperd v. State*, 94 Ala. 102, 10 South. 663; *Dennis v. State*, 112 Ala. 64, 20 South. 925; *Oakley v. State*, 135 Ala. 29, 33 South. 693; *Bohlman v. State*, 135 Ala. 45, 33 South. 44. See, also, *Goodlett v. State*, 136 Ala. 39, 33 South. 892.

An instruction that he who is to pass on the question is not at liberty to disbelieve as a juror, while he believes as a man, is misleading, and is properly omitted: *State v. Collins*, 20 Iowa, 85. And see *Hawes v. State*, 88 Ala. 37, 7 South. 302.

A charge not supported by any phase of the case is abstract and should be refused, as where it is based on the hypothesis that the prosecution relies solely on circumstantial evidence, when there is also positive testimony: *Rains v. State*, 88 Ala. 91, 7 South. 317.

2. **Miscellaneous.**—The court need not charge that it is no circumstance against the defendant that no one else was accused: *Shepperd v. State*, 94 Ala. 102, 10 South. 663, nor that any presumption of guilt which may be inferred from the circumstances proved is inferior to the legal presumption of innocence: *Morrison v. State*, 76 Ind. 335. And an instruction that in cases of circumstantial evidence, where the criminative circumstances are either denied by the defendant or are explained in such a way as to render their guilt doubtful, the jury should acquit, is properly refused, as it requires an acquittal in all cases of circumstantial evidence where the accused denies the circumstances, without reference to the credibility of the denial: *Long v. State (Fla.)*, 28 South. 775.

Where a charge on circumstantial evidence is correctly given it is sufficient, and it is not necessary to make an application of the law to the facts: *Grimsinger v. State (Tex. Cr. App.)*, 60 S. W. 583.

3. **Need not Repeat Instructions.**—The court having once correctly instructed on the law of circumstantial evidence, it is not error to refuse to give it in another part: *Roberts v. State*, 110 Ga. 253, 34 S. E. 203; *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194. See, also, *People v. Wright*, 136 N. Y. 625, 32 N. E. 629. So the court may decline to add that if there is a reasonable hypothesis consistent with the evidence and the defendant's innocence, it is the duty of the jury to adopt that hypothesis and acquit, where it had already charged that in order to convict on circumstantial evidence, it must be so strong as to exclude every other reasonable hypothesis than that of guilt, and the case being one of circumstan-

tial evidence in respect to the identity of the guilty party and admitting of no rational controversy as to the fact of the offense having been perpetrated by some person: *Smith v. State*, 63 Ga. 168.

L Instructions on the Weight of Circumstantial Evidence.

1. **Question for the Jury.**—The weight of circumstantial evidence is for the jury, and it is not error for the court to neglect to charge as to the rules of weighing it: *State v. Roe*, 12 Vt. 93. In *McMillan v. State*, 7 Tex. App. 100, the court said, quoting from *Chester v. State*, 1 Tex. App. 707: "As the jury are the sole judges of the weight of the testimony, whether it be positive or circumstantial, it cannot be properly said to be an error for the court to refuse to charge the jury upon legal presumptions and degrees of weight in testimony, unless some part of the testimony comes within the defined exceptions to the general rule, such as that 'a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed.' " Where the circumstances must determine whether the evidence does or does not supply a presumption of guilt, the jury should be instructed how to deal with these circumstances when they are placed before them: *Gablick v. People*, 40 Mich. 292. In *Solander v. People*, 2 Colo. 48, it was held no objection that the court declined to charge as to the weight of circumstantial evidence, there being a proper charge as to the doctrine of reasonable doubt.

2. **Statutory Prohibition on Comments on the Weight of Evidence or on the Facts.**—By positive enactment in some states, the judge is prohibited from charging the jury on the weight of evidence; and an instruction that circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction falls within the prohibition: *Horton v. State* (Tex. App.), 19 S. W. 899; as does also a charge that circumstantial evidence is often as strong and conclusive upon the understanding as direct and positive evidence: *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207. See, also, *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813. An instruction to the jury that it was competent for them to look to circumstantial testimony, as for instance, the acts and conduct of the accused, to ascertain his guilt, such as his absconding, so as to escape the laws, or being possessed of large sums of money, which he could not honestly account for, does not violate the provisions of a statute prohibiting judges from expressing or intimating their opinions as to what has or has not been proved, or as to the guilt of the accused: *Bulloch v. State*, 10 Ga. 47, 54 Am. Dec. 369. Saying that a party may be convicted on circumstantial evidence is not indicating any opinion as to the force and effect of that kind of evidence: *State v. Milling*, 35 S. C. 16, 14 S. E. 284. See, also, *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021.

Where the judge is forbidden from commenting on the facts, it is error for him to give an instruction intimating that circumstantial evidence is more to be relied on than direct: *State v. Crofford* (Iowa), 96 N. W. 889. The court there said: "The case made by the state was almost entirely circumstantial, while the defendant's case consisted almost entirely of direct evidence in denial and explanation. Now, if the court had said to the jury: 'The defendant's witnesses may have committed perjury, but the facts and circumstances proven by the state cannot lie,' this expression of opinion would be so clearly erroneous as to leave no room for argument in its support. We have no thought that the court intended to convey this idea, but it remains true that such is not an entirely unnatural paraphrase of its language, and such, we think, would be its weight and effect upon the mind of the average juror. It is a holding up of one kind or class of evidence in contrast with another; one being given the merit of absolute verity, and the other discredited by the possibility, if not, indeed, the suspicion, of falsehood. In other words, we think the jury could hardly fail to understand from this charge that, as a matter of law, or in the opinion of the court, the circumstantial evidence to which they had listened was of greater weight and of more convincing force than the direct evidence. In states having a statute like our own it has frequently been held that the charge of the court should be entirely free from any suggestion as to the weight of evidence: *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *Andrews v. People*, 60 Ill. 354; *Berry v. State*, 10 Ga. 511; *Walker v. State*, 42 Tex. 360; *Johnson v. State*, 1 Tex. App. 609; *White v. Territory*, 3 Wash. Ter. 397, 19 Pac. 37; *Cunningham v. State*, 65 Ind. 377. Reference to any particular fact or kind of evidence as being 'strong' or entitled to 'great weight' has often been held error: *Steele v. State*, 83 Ala. 20, 3 South. 547; *People v. Ah Sing*, 59 Cal. 400; *Boyer v. State*, 93 Tenn. 216, 23 S. W. 971. A charge to the jury that 'law-writers say that a chain of circumstances cannot lie, while a witness may,' has been held error upon the ground we have above suggested, as being calculated to impress on the minds of the jury the suspicion that defendant's witnesses have sworn falsely: *Cicero v. State*, 54 Ga. 156. See, also, *Harrison v. State*, 8 Tex. App. 183, 9 Tex. App. 407."

This same matter has been up before the California courts on several occasions, and they hold that the force of evidence is wholly for the jury to determine, and that an instruction that circumstantial evidence is not entitled to less credit than direct, and that circumstances are not likely to be fabricated, is an instruction as to a matter of fact within the prohibition of the constitution: *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297, disapproving *People v. Cronin*, 34 Cal. 191. In *People v. Wilder*, 134 Cal. 182, 66 Pac. 228, an instruction that there is nothing in the nature of circumstantial

evidence that renders it any less reliable than other classes of evidence; that a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow, was held not prejudicially erroneous, although there might be grave doubt as to whether it contained a proposition of law; and that *People v. Vereneseneckockockhoff*, 129 Cal. 509, 58 Pac. 156, did not go to the length of holding such an instruction reversible error.

Where the jury are instructed that they might convict on circumstantial, although it might not be as satisfactory to their minds as the direct testimony of a credible eye-witness, as was given in *People v. Cronin*, 34 Cal. 202, although erroneous, it is not a sufficient ground of reversal: *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581. That such a charge is not a matter for the court, but that it is for the jury to say how strong the circumstances must be, in order to satisfy their minds of the defendant's guilt, see *Buchanan v. State*, 109 Ala. 7, 19 South. 410.

3. **Comments by Courts on Circumstantial Evidence.**—In many instances, the court has commented upon the force and weight of circumstantial evidence, and has given the opinion of legal authorities upon that subject, and it has been held not error, full and fair charge thereon having been given. So to say in an instruction that such evidence is as good as any other kind, and that some text-writers hold that it is better than any other was held not objectionable: *West v. State*, 76 Ala. 98; nor is it to state that many, probably a majority, of convictions are had upon circumstantial evidence: *Funk v. United States*, 16 App. D. C. 478; and that circumstances cannot very well lie: *People v. Davis*, 64 Hun, 636, 19 N. Y. Supp. 781. See, also, *State v. Moelehen*, 53 Iowa, 310, 5 N. W. 186.

It is not error for the court to say to the jury that many great jurists have pronounced circumstantial evidence equally satisfactory with positive evidence and less likely to lead to perjury: *State v. Ward*, 61 Vt. 153, 17 Atl. 483; and in *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. Rep. 334, the following comment of the court, referring to the necessity of determining the condition of the mind, was held not error: "Some say we cannot do it by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence. This is a declaration of either fools or knaves, sympathetic criminals or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship."

In the following cases comments by the judge upon various cases where circumstantial evidence wrongly produced convictions were upheld: *People v. Cronin*, 34 Cal. 191; *State v. McKiernan*, 17 Nev. 224, 30 Pac. 831; *People v. Neufeld*, 165 N. Y. 43, 58 N. E. 786, 15 N. Y. Cr. Rep. 178.

XI. In Civil Cases.

a. Admissibility in General.—While circumstantial evidence plays its most important part in the domain of criminal law, it may be and has been made use of, as well in civil cases, and a verdict in such a suit may be based on that kind of evidence: *Culbertson v. Hill*, 87 Mo. 553. The proposition that a well-connected train of circumstances is as conclusive of the existence of a fact as is the greatest array of positive testimony applies as a general rule as well in equity as in law: *Orman v. Barnard*, 5 Fla. 528. No safe conclusion can, however, be deduced from circumstantial evidence if it be left reasonable to suppose that the circumstances themselves did not transpire: *Wroth v. Norton*, 33 Tex. 192. When a plaintiff's right to recover depended upon the establishment of a particular fact, and the only proof offered for this purpose was circumstantial evidence from which the existence of such fact might be inferred, but which did not demand a finding to that effect, a recovery by the plaintiff was not lawful, when, by the positive and uncontradicted testimony of unimpeached witnesses, which was perfectly consistent with the circumstantial evidence relied on by the plaintiff, it was affirmatively shown that no such fact existed: *Frazier v. Georgia etc. Banking Co.*, 108 Ga. 807, 33 S. E. 996.

Evidence of this character may be used to deny positive statements. So the receipt of a less amount than was due on a note may be shown by circumstances against the positive affirmative testimony of the maker that he paid the full amount: *Metropolitan Bank v. Smith*, 4 Rob. (N. Y.) 229.

b. Sufficiency Required for a Verdict.—The rule of criminal law that where circumstantial evidence is submitted, the facts proved must be such as to preclude every other hypothesis but the guilt of the accused, does not apply in civil cases: *Ripsey v. Miller*, 46 N. C. (1 Jones) 479, 62 Am. Dec. 177; and proof of circumstances warranting a given inference is sufficient in such cases: *Albrecht v. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; citing *Indianapolis etc. R. R. Co. v. Collingwood*, 71 Ind. 476; *Louisville etc. R. Co. v. Balch*, 122 Ind. 583, 23 N. E. 1142. And where there two equally plausible conclusions deducible from the circumstances, the jury must be left to decide which of the two shall be adopted, as every other reasonable conclusion than the one arrived at need not be excluded in civil actions: *Chicago etc. R. Co. v. Wood*, 66 Kan. 613, 72 Pac. 215. In *Chicago etc. R. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58, the court held that to establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such a nature, and so related to each other, that the only reasonable conclusion that might be drawn therefrom was the theory sought to be established: Citing *Asbach v. Railway Co.*, 74 Iowa, 248, 37 N. W. 182; *Carruthers v. Chicago etc. R. Co.*, 55 Kan. 600, 40 Pac. 915.

WHITE v. COMMERCIAL AND FARMERS' BANK.

[66 S. C. 491, 45 S. E. 94.]

CORPORATIONS—Liability of Stockholders—Sale of Stock.—Stockholders in a bank who in good faith transfer their stock to the cashier of the bank while it is solvent, with instructions to transfer it on the books of the bank, which is not done, are, in the event of the insolvency of the bank, liable to its creditors for the amount of the stock originally held by them. (p. 818.)

CORPORATIONS—Contracts Ultra Vires.—The general rule is, that if a corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation cannot be heard on a plea of ultra vires. (pp. 818, 819.)

CORPORATIONS—Contract Ultra Vires.—If a corporation, in violation of its charter, purchases stock in a bank, it is not liable to the creditors of the bank upon the insolvency of the latter, for bank stock subscribed and paid for and on which it has collected dividends. (p. 821.)

CORPORATIONS.—Contracts Ultra Vires cannot be made the foundation for the liability of a corporation, nor can a corporation be made liable on a contract which the law prohibits it from entering into. (p. 821.)

UNLAWFUL CONTRACTS—Relief.—Courts do not lend their aid in the enforcement of rights growing out of a contract expressly forbidden by statute, but leave the parties to the unlawful contract where they find them. (p. 821.)

The decree of the circuit court, together with appellant's exceptions, directed to be set out as a part of the opinion; herein, are as follows:

"Let us consider the issues as to E. B. Mobley, John G. Anderson, and N. B. Williams, at the foot of the notes of reference, held at Rock Hill, South Carolina, on November 7, 1902, appears the following written agreement, signed by the counsel of the parties: 'It is agreed between plaintiff's counsel herein and counsel for defendants, E. B. Mobley, John G. Anderson and N. B. Williams, that the facts relating to the transfer of the Commercial and Farmers' Bank stock by John G. Anderson and N. B. Williams are the same in all respects as those relating to the transfer of said stock by E. B. Mobley as shown by the testimony herein, excepting as to dates of transfer, the N. B. Williams stock having been transferred on the sixth day of January, 1900. Under this agreement, N. B. Williams submits to the jurisdiction of the court and his (answer) is to be regarded as duly served and filed.'

“As to E. B. Mobley, the referee held: ‘I find that he transferred his twelve shares of stock to R. Lee Kerr on the fourteenth day of August, 1899, in good faith, for value received, and at the time of the transfer of said stock he instructed the said R. Lee Kerr to enter the transfer on the books of the bank; but that Kerr failed to carry out his instructions, and the attempted transfer failed to meet the requirements of section 1894 of the Revised Statutes, which provides that: ‘No transfer of stock shall be valid, except as between the parties thereto, until the same shall have been regularly entered on the books of the corporation, etc.’ This statute not having been complied with, so far as the creditors of the bank are concerned, Mr. Mobley is liable for the sum of twelve hundred dollars, the amount of his stock in said bank: *Parker v. Bank*, 53 S. C. 594. Mr. E. B. Mobley has filed five exceptions to the conclusions of the referee. The first is: ‘Because the testimony shows, not only that E. B. Mobley transferred his stock to R. Lee Kerr on the fourteenth day of August, 1899, in good faith and for value, but also that he did all that a careful and prudent business man could reasonably do to effect a transfer on the books of the bank, and this relieved him of all liability incident to the subsequent ownership of said stock, and the said referee erred in not so holding.’ There was no error in the referee’s failing to find that E. B. Mobley ‘did all that a careful and prudent business man could reasonably do to effect a transfer on the books of the bank.’ E. B. Mobley could, by process of law, have compelled the said transfer. He knew that a failure ‘to effect a transfer’ of the stock, on the books of the bank, continued his liability as a stockholder to the creditors of the bank. The act provides how stock shall be transferred, and, in mandatory terms, enacts that ‘No transfer of stock shall be valid, except as between the parties thereto, until the same shall have been regularly entered on the books of the corporation.’ Mr. Mobley’s transfer to R. Lee Kerr was good as between them; but it was not valid as against the creditors of the bank. R. Lee Kerr was the agent of Mr. Mobley to make the transfer on the books of the bank, and the principal is liable in favor of creditors for the default of the agent. R. Lee Kerr may be liable in damages to Mr. Mobley for any loss he may sustain by reason of R. Lee Kerr’s failure to transfer the stock on the books of the bank;.

but such liability is another reason why Mr. Mobley is liable to the creditors of the bank. This exception is overruled.

"E. B. Mobley's second exception: 'Because the testimony shows that R. Lee Kerr, the purchaser of E. B. Mobley's twelve shares of stock, was the cashier of the Commercial and Farmers' Bank and its chief executive officer; that he had charge of all the bank's books, including its stock certificate and stub-book, which provided for entering of stock transfers; that his name was signed to the stock certificates issued by said bank, and he was thus the proper officer to make the transfer of the stock; that he was duly authorized by the terms of the written assignment on E. B. Mobley's stock certificate to make the proper transfer on the books of the bank; that he was specifically instructed to make such transfer, and promised E. B. Mobley that this would be done; from all of which it appears that said E. B. Mobley did all that a reasonably prudent and careful man could do to make such transfer complete, and the said referee should have held that the said E. B. Mobley was thus absolved from any liability incident to the subsequent ownership of said stock, even though the transfer was not entered upon the books of the bank, and the said referee erred in not so finding and holding.' This exception, argumentative in its statement, is practically the same as the first, and is overruled for the reasons already stated. It is not necessary for me to refer to R. Lee Kerr, his methods of conducting the corporation with which he was connected as an officer; but, according to the testimony and comments of counsel based thereon, it does not seem that a reasonably prudent and careful business man would have dealt with him as Mr. Mobley did. The fact that others around Rock Hill dealt with R. Lee Kerr as E. B. Mobley did, is not conclusive of the fact that Mr. Mobley's conduct was reasonable or careful or prudent, for if reasonable care and prudence had been exercised by the stockholders of the bank, neither the bank nor the stockholders would be in the condition they are now in.

"The third exception is: 'Because the statutory provision in the act under which the Commercial and Farmers' Bank was incorporated, that "no transfer of stock shall be held valid except as between the parties thereto until the same shall have been regularly entered upon the books of the corporation," was intended solely for the benefit and protection of

the corporation itself and its stockholders, and not for the benefit of creditors or depositors, and the referee erred in not so holding.' The liability of a stockholder for a sum equal to the amount of his stock is for the protection of the creditors of the corporation, and the statute regulating the transfer of stock was for the benefit of creditors, and, as regards creditors, the status of a stockholder is determined under the act. How can the act be for the benefit and protection of the corporation itself and the stockholders, when the act, in express terms, excepts from its provisions 'the parties thereto,' viz., the transfer. Only a stockholder in a bank can transfer stock, because no one but a stockholder has stock therein. The party to whom the stockholder sells, when he has duly obtained his certificate, is the other party to the transaction. Clearly, the act was not intended for the protection of stockholders. There is nothing to warrant the assumption that the act was not intended for the benefit of creditors, if it be admitted or declared that it is, also, of benefit to the corporation. It may benefit both; it is certainly for the benefit of creditors. This exception is overruled.

"'4. Because the said referee erred in not finding and holding that E. B. Mobley, having sold and transferred his twelve shares of stock in good faith and for value on the fourteenth day of August, 1899, while the said bank was solvent and a going concern, the liability attaching to said stock went with it to his transferee.' Under the terms of the act, the transfer was valid as between E. B. Mobley and R. Lee Kerr, and, as between these parties, the liability attaching to said stock may be upon R. Lee Kerr. It is very different as between Mobley, the stockholder on the books of the bank, and the creditors of the bank. The act is not restricted to insolvent corporations, it applies to solvent and going corporations. The evil that the act remedied was collusive transfers of stock, and to provide a means whereby the stockholders of corporations could be ascertained for any legitimate purposes by proper parties. Hence, the law providing for lists of stockholders, certificates of stock, and the method of transfers of stock. When the act says 'that no transfer of stock shall be valid until the same shall have been regularly entered on the books of the corporation,' it means that, until the law is complied with, the transfer is invalid. This exception is overruled.

“‘5. Because the said referee erred in not holding that the liability of stockholders of the Commercial and Farmers’ Bank was secondary, and that E. B. Mobley having sold while said bank was solvent and a going concern, is not liable as a stockholder for any of the debts of said corporation. It does not appear that at the time E. B. Mobley sold said stock to R. Lee Kerr, the bank was a solvent concern. It does appear that at the time the bank went into the hands of the receiver, when it was insolvent and had ceased business, that E. B. Mobley’s name appeared upon the books of the bank as a stockholder; and that under the law he is such stockholder for the benefit of the creditors of the bank.’ This exception is overruled.

“Wherefore, it is ordered, adjudged and decreed that the exceptions of E. B. Mobley to the report of the referee herein be and hereby are overruled; that said report be and hereby is affirmed; and that the plaintiffs have and hereby are given judgment in their favor, and against E. B. Mobley, defendant, in the sum of twelve hundred dollars.”

“As to John G. Anderson, the referee reports: ‘I find, as a matter of fact, that for value received, he transferred his stock amounting to ten shares to R. Lee Kerr in good faith on the eighteenth day of September, 1899, but that said transfer was never entered upon the books of the bank, and hence, under the statute and authority above cited, the said transfer is invalid, so far as the creditors of the Commercial and Farmers’ Bank are concerned; and that the said John G. Anderson is liable in the sum of one thousand dollars, being the amount of shares held by him in said bank. The attorneys for the defendants Mobley and Anderson contended that if these defendants are liable at all on their stock, that said liability is secondary. I cannot agree with this view of the law, and I hold that the liability of these defendant stockholders is primary. But even if defendant’s attorney is correct in his view of the law, it could not avail him anything in this action, for the reason that it has been proven and admitted that the Commercial and Farmers’ Bank is insolvent.’

“The exceptions of John G. Anderson to the report of the referee are substantially, if not exactly, the same as those of E. B. Mobley, and for the reasons stated in considering the

exceptions of E. B. Mobley, the exceptions of J. G. Anderson are overruled.

“As to the liability of the stockholders to creditors, whether primary or secondary: I do not see how it can be of any consequence in this case. It might be admitted that the liability was secondary and yet these defendants would be liable; because, as the referee finds, ‘it has been proven and admitted that the Commercial and Farmers’ Bank is insolvent.’

“Wherefore, it is ordered and adjudged, that the exceptions of J. G. Anderson to the report of the referee herein be and hereby are overruled; that said report be and hereby is confirmed; and that plaintiffs have and hereby are given judgment in their favor and against J. G. Anderson, defendant, in and for the sum of one thousand dollars.

“The referee reported as to N. B. Williams: ‘This gentleman appeared in action No 1, above, through W. J. Cherry, Esq., by Mr. Cherry answering for him. In October last, Mr. Cherry asked for leave to withdraw said answer, stating that he had served the answer in response to a request of R. Lee Kerr, and that Mr. Williams had denied Kerr’s authority in the premises. Mr. Cherry subsequently appeared for Williams, to enter a plea to the jurisdiction, on the ground that Williams had never been served with the process. If Williams properly appeared in this action, that is as good as service; and in the absence of formal proof before me by Williams personally to the contrary, I hold that he is a proper party in said action, and has waived service by appearing and answering; and, therefore, I hold that he is liable for the sum of five hundred dollars, the same being the amount of his stock.’ The agreement of counsel, heretofore stated, disposed of the question of jurisdiction. The exceptions of N. B. Williams are the same as those of E. B. Mobley, and are overruled.

“Wherefore, it is ordered, adjudged and decreed that the exceptions of N. B. Williams to the report of the referee herein be and hereby are overruled; that the report of the referee be and hereby is affirmed; and that the plaintiffs have and hereby are given judgment in their favor, and against N. B. Williams, defendant, in and for the sum of five hundred dollars.

“As to the Rock Hill Real Estate and Loan Company, the referee reports: ‘This company denies its liability as a stockholder on the ground that it is not authorized or permitted

by its charter to become a stockholder in the Commercial and Farmers' Bank or in any other bank; that the thirty shares of stock were subscribed for by R. Lee Kerr without the authority of the board of directors of said loan company; that the act of subscription was ultra vires and void both under the charter of the loan company and under the general corporation laws. I find as a matter of fact that R. Lee Kerr was the executive officer of the Rock Hill Real Estate and Loan Company; that he attended to most of its business without consultation with any of its officers; and that its officers and directors acquiesced and allowed him almost unlimited authority in the conduct of its business; nevertheless, in this instance of subscribing to the stock of the Commercial and Farmers' Bank, the directors of the Rock Hill Real Estate and Loan Company, or at least a majority of them, were aware of the fact that the said company had subscribed for thirty shares of stock in the Commercial and Farmers' Bank; that the said stock was issued to the company and paid for, and it received dividends on the same; that it pledged said stock as security for its obligations, and in every way ratified Kerr's act in subscribing for the same. I am free to state that I do not think that under the charter of the Rock Hill Real Estate and Loan Company that the said company had the right to purchase or subscribe for or hold stock in the Commercial and Farmers' Bank; still, when the stock had been actually issued and paid for, and the company has received dividends on it, used it as collateral for its obligations, it is now too late, when the said bank is insolvent, for it to plead the act of subscription as ultra vires. It is now estopped from denying its liability as a stockholder, and under section 1775 of the Code of 1902, volume 1, the said Rock Hill Real Estate and Loan Company is liable to the amount of three thousand dollars, on account of the thirty shares of stock in the Commercial and Farmers' Bank.'

"The Rock Hill Real Estate and Loan Company excepts to the aforesaid findings of the referee upon the following grounds: '1. In holding as matter of fact that the act of R. Lee Kerr in making the alleged subscription on behalf of said company to stock of the Commercial and Farmers' Bank was acquiesced in by the officers and directors of the loan company; 2. In holding that a majority of the directors of the loan company

were aware of the subscription; 3. That the loan company "in every way ratified Kerr's act in subscribing for said stock"; 4. In holding that "it is now too late, when the bank is insolvent, for it to plead the act of subscription as ultra vires. It is now estopped from denying its liability as a stockholder"; 5. In holding that said loan company and the receiver is liable to the amount of three thousand dollars on said alleged subscription; 6. For error in not holding that the ultra vires act in this instance could only be ratified, if at all, by the unanimous body of stockholders; 7. For error in not holding that agents cannot ratify their own ultra vires acts.'

"The Rock Hill Real Estate and Loan Company is sued, in this action, as one of the stockholders of the Commercial and Farmers' Bank. Its answer to this suit is a general denial. The Rock Hill Real Estate and Loan Company is itself a corporation on the installment plan, and its charter is found in 20 Statutes, page 248. Nowhere in its charter is any authority given whereby it may invest its funds in the stock of another corporation. Its charter prescribes, defines and limits the purposes for which it is created, and for which its funds may be employed. Section 7 of the charter of the Rock Hill Real Estate and Loan Company (20 Stats. 250) incorporates 'the restrictions and liabilities' of the general incorporation act of 1886, found in 19 Statutes, page 540 et seq. This act does not confer upon one corporation the right to subscribe to the capital stock of another; but, to the contrary, subdivision '(E)' of section 22 of that act (page 547), specifically declares: 'That no part of the capital stock of any of the funds of such corporation shall at any time during the continuance of their charter be used or employed, directly or indirectly, in banking operations, or for any purpose whatsoever inconsistent with the provisions of their respective charters.' So that the charter of the Rock Hill Real Estate and Loan Company should be read with this provision from the general act of 1886 as written in it. If the Rock Hill Real Estate and Loan Company had not been prohibited from subscribing to the capital stock of the bank, it would nevertheless, under the general law, have been prohibited from doing so. One corporation has no right to organize another corporation, or to take stock in another corporation, unless such right is conferred by its charter: 1 Morawetz on Private Corporations, sec. 433.

"This doctrine is affirmed in this state in the case of Lagrone v. Timmerman, 46 S. C. 410, 24 S. E. 290. This case holds, 'That a corporation, which is a creature of the legislature, can have no powers, except such as are conferred by its charter, either in express terms or by necessary implication, is a proposition too well settled to need authority to sustain it.' It is no answer to say that the Rock Hill Real Estate and Loan Company did not organize the bank; that it took but three thousand dollars worth of stock in the bank, which was only a small portion of its capital, for the prohibition extends to such act in whole or in part. The general act of 1886, supra, provides that 'no part' of the capital stock, 'or any of the funds' of such corporation, shall 'at any time' be either 'used or employed, directly or indirectly, in banking operations.' I think that the referee was right when he reports that 'I am free to state that I do not think that under the charter of the Rock Hill Real Estate and Loan Company, that the said company had the right to purchase, or subscribe for, or hold stock in the Commercial and Farmers' Bank.' The purchasing, subscribing for and holding of said stock by said company was not only without warrant of law, but also in direct violation of law; it was an ultra vires act. R. Lee Kerr was a director in and treasurer of the Rock Hill Real Estate and Loan Company, and a director in and cashier of the bank. He was the organizer and promoter of the bank. The referee finds, 'in this instance of subscribing to the stock of the Commercial and Farmers' Bank, the directors of the Rock Hill Real Estate and Loan Company, or at least a majority of them, were aware of the fact that the said company had subscribed for thirty shares of stock in the Commercial and Farmers' Bank.' This may be correct; but R. Lee Kerr testified that he made said subscription without consulting the board of directors or any of the stockholders. This seems to be the fact, and it may be that after Kerr had so acted, a majority of the directors were aware of the fact. A. H. White, who signed as president of the bank the certificate of stock of the loan company, was not a director in the loan company at that time.

"The interest that Kerr had in the bank and the loan company, both being corporations, disqualified him from dealing between them: 1 Morawetz on Private Corporations, secs. 520, 521, 528, 530. In Duncan v. City of Charleston, 60 S. C.

558, 39 S. E. 265, this doctrine is sustained and enforced. It follows that the act of the loan company in subscribing for stock in the bank was ultra vires, and that action of Kerr in subscribing for the stock as the agent of the loan company, and accepting said subscription as the agent of the bank, acted as agent of both parties, in matters in which he was officially and personally largely interested, and that such action was voidable, to say the least, because contrary to law.

"The referee does not, at least in terms, find that the act of Kerr in subscribing for the stock was ratified by the loan company, but such position was taken by plaintiffs at the hearing. If the argument is correct that Kerr absolutely controlled the affairs of the loan company, then the only ratification that can be called to aid the transaction are the acts of Kerr himself. He, as cashier of the bank, credited the loan company, of which he was treasurer, with dividends in July, 1899. He, as treasurer of the loan company, pledged the certificate of stock to secure loan to the loan company. The same agent that made the illegal and ultra vires contract, is the one who ratified it. So that we are still within the same circle.

"The referee reports that the loan company 'in every way ratified Kerr's act in subscribing for the same,' the stock; but a casual reading of the report will show that the stockholders never ratified it. The acts relied upon as amounting to a ratification of the subscription are: 1. That the stock was issued to the company and paid for; 2. It received dividends on the same; and 3. That it pledged said stock as security for its obligations. The first ground is a part of the ultra vires contract. The issuance of and payment for the stock is the act complained of. To hold that the issuance of the stock to the loan company, and its payment for the same, estops it from pleading that the purchase was ultra vires, is simply to ignore the law. It amounts to saying that a prohibited act done despite the prohibition is, by reason of the doing of said act, upon the doctrine of estoppel, released and relieved of the prohibition. The second and third grounds, the reception of a dividend, and the pledging of the bank stock, were known only to the directors, 'or at least a majority of them,' but it was not known to them 'as directors'—that is, the matter never came before them, the directors assembled as a board; and the stockholders,

outside of the directors, or a majority of them, had no knowledge of the facts referred to. To hold all the stockholders of the loan company liable, whether they be legal or illegal stockholders, is to say that the illegal and unwarranted act of R. Lee Kerr, done in defiance of the law of the land, and in utter disregard of the rights of the stockholders, is binding upon the stockholders, when the illegal and unwarranted conduct and act of Kerr was known to only a portion of the directors, and not to the stockholders generally.

“The essential elements of estoppel are stated in the seventh volume of the American and English Encyclopedia of Law, first edition, on page 12 et seq. On page 15 it is stated as the third essential element, that ‘the party relying on the representation must have been ignorant of the facts.’ The plaintiffs had as much knowledge of the law, the charter of the loan company, as that company had. The charter was a public act. The loan company did not, and could not, have concealed the charter from the plaintiffs, and if the plaintiffs were ignorant of anything, it was the law of this state. Plaintiffs entered into contractual relations with the defendant; for the liability of the loan company came into existence, if at all, when plaintiffs entered into their contracts with the bank. The law of the state entered into that contract, and that law, which makes a bank stockholder liable, as is claimed in this case, also, in plain terms, actually prohibited the loan company from becoming a stockholder in a bank. ‘A contract of a corporation, which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined by the law of its organization, and that from beyond the power conferred upon it by the legislature—is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or the foundation of any right of action upon it’: *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 59-60, 11 Sup. Ct. Rep. 478; *Jacksonville etc. Ry. Co. v. Hooper*, 160 U. S. 514, 524, 530, 16 Sup. Ct. Rep. 379; *California Bank v. Kennedy*, 167 U. S. 368, 17 Sup. Ct. Rep. 831.

“The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law’: *California Bank v. Kennedy*, 167 U. S. 368, 17 Sup. Ct. Rep. 831. The court, in support of its decision, cite a great number of American and English cases. In a similar case—*California Bank v. Kennedy*, 167 U. S. 369, 17 Sup. Ct. Rep. 831—the court says: ‘The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks’ (in the case at bar, the loan company was expressly prohibited from purchasing or dealing in bank stocks), ‘nor is it an act which may be exercised as incidental to the powers conferred. A dealing in stocks is consequently an ultra vires act. Being such, it is without efficacy: *Pearce v. Madison etc. R. R. Co.*, 21 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred: 1 Cook on Stock and Stockholders, p. 435, note 1, to sec. 316, and authorities there cited.’ ‘The claims that the bank, in consequence of the receipt by it of dividends on the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified’: *California Bank v. Kennedy*, 167 U. S. 371, 17 Sup. Ct. Rep. 835.

“As was said by the supreme court of the United States in *Union Pacific Ry. v. Chicago etc. Ry.*, 163 U. S. 564, 16 Sup. Ct. Rep. 1173, speaking through Mr. Chief Justice Fuller (page 581): ‘A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construc-

tion of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.'

"While, therefore, I concur with the referee in the opinion that the subscription of the loan company to the stock of the bank, as made in this case, was an ultra vires act, I do not concur in his view, either as a finding of fact or a conclusion of law, that the stockholders of the loan company, or the loan company itself, ratified such subscription; or that the loan company, or the stockholders of the loan company, are estopped from asserting that said act of subscription was ultra vires.

"I hold, as a conclusion of fact and law, that the aforesaid act, subscription by the Rock Hill Real Estate and Loan Company to the capital stock of the Commercial and Farmers' Bank, was, and is, ultra vires; and that the plaintiffs cannot sustain this action against said loan company.

"Wherefore, it is ordered, adjudged and decreed that the exceptions of the Rock Hill Real Estate and Loan Company to the report of the referee herein be and hereby are sustained; that the report of said referee herein as to said loan company be and hereby are reversed; and that the action of the plaintiffs herein, as against the Rock Hill Real Estate and Loan Company, defendants herein be, and the same hereby is dismissed with costs.

"It might be said, that as all of the parties are before the court, that the court should go on and dispose of all issues which might be presented in this case. But I am not certain that all the parties interested in such possible issues are before the court, and I am confirmed in my view by the statement of the counsel for plaintiff, submitted in writing as follows: 'If the Commercial and Farmers' Bank was a solvent corporation, and it were worth while to do so, the real estate and loan company might now bring its action to recover the money illegally paid for the thirty shares of capital stock in the bank.'

"The answer of the loan company is a general denial, and sets up no affirmative defense.

"The issues in the consolidated causes not disposed of in my former decree, nor in this decree, are continued."

Defendants Mobley, Anderson and Williams appeal on following exceptions:

"1. Because, as respectfully submitted, his honor erred in not finding that each of these defendants, in the sale and transfer of his Commercial and Farmers' Bank stock to R. Lee Kerr, made use of reasonable and proper care, prudence and diligence to effect the entry of the transfer of his said stock on the proper book of said bank, and in not holding that the use of such care, prudence and diligence relieved them of all liability incident to the ownership of said stock.

"2. Because of error, holding that these defendants are liable to creditors for the default of R. Lee Kerr as their agent to transfer their stock; whereas, it is respectfully submitted his honor should have held that said Kerr, as cashier of said bank, was charged with the duty of entering its stock transfers, and that these defendants, having delivered their stock to him with proper directions, were not liable for his omission.

"3. Because of error, holding that these defendants are rendered liable to creditors of said bank solely from the fact of their names being found upon its stock books at the time of its going into the hands of a receiver, and without regard to any knowledge or the use of due diligence by them, or to any knowledge by the creditors as to said books.

"4. Because of error, not holding that the statutory provision, 'No transfer of stock shall be valid except as between the parties thereto until the same shall have been regularly entered upon the books of the corporation,' was designed solely for the safety and protection of the corporation itself and its stockholders, and not for the benefit of creditors or depositors.

"5. Because each of these defendants, having sold and transferred his stock in good faith prior to the commencement of these actions and before the said bank was adjudged insolvent, is thus relieved of all liability to creditors of said bank, and, it is respectfully submitted, his honor erred in not so finding and holding.

"6. Because, it is respectfully submitted, his honor erred in not holding that the liability of stockholders of the Commercial and Farmers' Bank is secondary, and that these defendants, having sold their stock while said bank was solvent and a going concern, are not liable as stockholders for any of the debts of said corporation."

Plaintiffs Blackmon, Estridge & Co. appeal on following exceptions:

"It is respectfully submitted that his honor erred:

"1. In holding that the Rock Hill Real Estate and Loan Company was without authority to purchase, subscribe for or hold stock in the Commercial and Farmers' Bank of Rock Hill, and that such purchasing, subscribing for and holding of said stock by the said loan company was an ultra vires act.

"2. In holding that the interest R. Lee Kerr had in said bank and loan company, both being corporations, disqualified him from dealing between them.

"3. In holding that the subscription to and holding of said stock was not ratified by the loan company, and that it cannot be.

"4. In holding that the Rock Hill Real Estate and Loan Company is not estopped from denying that it is a stockholder in the Commercial and Farmers' Bank, and is liable as such.

"5. In holding as a conclusion of law and fact that the subscription by the Rock Hill Real Estate and Loan Company to the capital stock of the Commercial and Farmers' Bank was an ultra vires act, and that the plaintiffs cannot sustain their action against the said loan company."

W. J. Cheny, T. Y. Williams, D. E. Finley and Wilson & Wilson, for the appellants.

Witherspoon & Spencers and J. F. Hart, for the appellees.

⁵⁰⁸ GARY, J. The following statement appears in the record:

"The first above-stated action was commenced on the third day of February, 1900, for winding up the affairs of the Commercial and Farmers' Bank of Rock Hill, South Carolina, insolvent, by the appointment of a receiver to collect and distribute its assets, including the fund due from its stockholders, all of said stockholders being made defendants. A ⁵⁰⁹ receiver was duly appointed in this action, who is now administering the affairs of said bank.

"The other two actions, in the nature of creditors' bills, were brought about the same time against certain of the stockholders of said bank (named also as defendants in the first action) to recover the amounts of their individual liability to depositors.

"The said three actions were consolidated by an order of the court, dated the twenty-ninth day of May, 1900.

"By amended complaint in the first above stated action, E. B. Mobley, John G. Anderson and N. B. Williams were made defendants therein on the second day of May, 1900. These three defendants are not parties to either of the other two actions. As none of the parties to the second above-stated action have anything to do with this appeal, they are to avoid confusion, named as respondents.

"A referee was appointed to take the testimony and report upon all of the issues of law and fact; and these consolidated actions came up for a hearing at the November (1902) term of the circuit court for York county, upon so much of said referee's report as related to the liability of stockholders, and exceptions thereto, all other issues being reserved. Upon these issues, his honor, James Aldrich, filed his decree herein on the ninth day of February, 1903. E. B. Mobley, John G. Anderson and N. B. Williams, defendants in the first action, gave due notice of their intention to appeal from the said decree in so far as it held them liable as stockholders, and subsequently duly served their exceptions. The plaintiffs, Blackmon, Estridge & Co., gave due notice of their intention to appeal from said decree in so far as it held that the Rock Hill Real Estate and Loan Company was not liable as a stockholder, and thereafter, within the time required by law, served their exceptions."

The decree of his honor, the circuit judge, and the appellants' exceptions will be set out in the report of the case.

While the decree fully and ably disposes of all the questions raised by the said exceptions, we, however, deem it ⁵¹⁰ advisable to add some words in explanation of the principle under which the Rock Hill Real Estate and Loan Company is enabled to escape the statutory liability imposed upon the stockholders of the Commercial and Farmers' Bank, on the ground that its contract for subscription to the shares of stock was prohibited by statute, and was, therefore, ultra vires. There is a general discussion of this subject in *Lancaster County v. Cheraw etc. R. R. Co.*, 28 S. C. 142, 5 S. E. 338, and *Williamson v. Eastern Bldg. etc. Assn.*, 54 S. C. 595, 71 Am. St. Rep. 822, 32 S. E. 765. In the last-mentioned case the court quotes with approval the following language from *Bedford Belt Ry. Co. v. McDonald*, 60 Am. St. Rep. 172: "The general rule is that where a private corporation has entered into a contract not immoral in

itself, *and not forbidden by any statute*, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires (*italics ours*). The court, in the case of Vought v. Eastern Bldg. Assn., 172 N. Y. 508, 105 N. E. 496, thus states the principle: "We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts; for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude, *and did not offend any express statute*, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of ultra vires, when the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of the performance of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters, and when they do so, their exemption from liability cannot be claimed on the mere ground that they have no attributes or facilities which render it possible for them thus to act. While they have no right ⁵¹¹ to violate their charters, yet they have the capacity to do so, and are bound by their acts, where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced; yet, when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot plead that the contract was beyond its power" (*italics ours*). This language is quoted with approval in Eastern Bldg. etc. Assn. v. Williamson, 189 U. S. 122, 23 Sup. Ct. Rep. 527.

In Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 60, 11 Sup. Ct. Rep. 478, it is said: "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the un-

lawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract."

Lord Mansfield, in *Holman v. Johnson*, 1 Camp. 341, thus states the rule: "The objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to ⁵¹² a man who founds his cause of action upon an immoral or an illegal act."

The court, in *Pullman Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 18 Sup. Ct. Rep. 808, after quoting the foregoing language from the two cases last mentioned, proceeds as follows: "The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, 11 Sup. Ct. Rep. 478, already cited. The right to the recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine applied to particular facts, we refer in the margin to a few of the multitude of cases on the subject. They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where in order to maintain such recovery it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of the courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor per-

mit any recovery which will weaken the rule founded upon the principles of public policy, already noticed."

Under the caption, "Provisions Applicable to Corporations Generally," in the Code of Laws, section 1843 (subdivision E), appears the following: "No part of the capital stock or any of the funds of such corporation shall at any time during the continuance of their charter be used or employed, directly or indirectly, in banking operations, or for any purpose whatsoever inconsistent with the provisions ⁵¹⁸ of their respective charters." Section 1775 of the Code of Laws is as follows: "The stockholders of banks shall be liable to the amount of their respective share or shares, and five per cent thereof in addition thereto, for all of its debts and liabilities upon note, bill or otherwise."

The foregoing cases show that a contract which is ultra vires cannot be made the foundation for the liability of the corporation, and, furthermore, that a corporation cannot be made liable on a contract which the law prohibits it from entering into. When the Rock Hill Real Estate and Loan Company purchased the shares of stock in the Commercial and Farmers' Bank, it was in violation of the statute. The court will not lend its aid in the enforcement of rights growing out of a contract expressly forbidden by statute, but will leave the parties to the unlawful contract where it finds them.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The Right of One Corporation to Acquire Stock in another is discussed in the monographic note to Denny Hotel Co. v. Schram, 36 Am. St. Rep. 137-142. For authorities recognizing this right, see Cannon v. Brush Elec. Co., 96 Md. 446, 94 Am. St. Rep. 584, 54 Atl. 121; Northern Cent. Ry. Co. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253; and for authorities denying the right unless expressly conferred by the charter or statutes, see Lanier Lumber Co. v. Rees, 103 Ala. 622, 49 Am. St. Rep. 57, 16 South. 637; Bank of Commerce v. Hart, 37 Neb. 197, 40 Am. St. Rep. 479, 55 N. W. 631. See, also, State v. Newman, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 South. 408; Calumet Paper Co. v. Stotts Invest. Co., 96 Iowa, 147, 59 Am. St. Rep. 362, 64 N. W. 782; Farmers' Loan etc. Co. v. New York etc. Ry. Co., 150 N. Y. 410, 55 Am. St. Rep. 689, 44 N. E. 1043. An attempt by the directors of one corporation to invest its capital stock in another is held ultra vires and void in Commercial etc. Ins. Co. v. Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17, 14 South. 490; and in Chemical Nat. Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071, it is held that one corporation is not estopped, when sued as a stockholder in another, to urge that it had no authority to purchase the stock, although it had received dividends thereon.

Transfers of Corporate Stock, as respects the manner made and the validity thereof, are discussed in the monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 388-396. The appearance of a name on the books of a corporation as stockholder is *prima facie* evidence that the holder of such name is the owner, and creditors of the corporation can ordinarily hold him liable as a stockholder: *Sherwood v. Illinois Trust etc. Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734. See, also, *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639; *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269. It is held in *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696, that a purchaser of bank stock cannot escape his statutory liability, upon the insolvency of the bank, on the ground that the stock has not been transferred to him on the books of the bank.

The Defense of Ultra Vires cannot be set up by a corporation, when a contract has been performed and it has enjoyed the benefit of the performance, at least if the contract is one not prohibited by law or good morals: See *Vought v. Eastern Bldg. etc. Assn.*, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 156-180.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

COOLEY v. GALYON.

[109 Tenn. 1, 70 S. W. 607.]

LIBEL AND SLANDER—Pleadings.—The defense that the words claimed to be slanderous were spoken by a witness in the course of a judicial proceeding may be received in evidence, either under a special plea or the general issue. (p. 825.)

PRACTICE—Demurrer to the Evidence—Right to Interpose, When not Waived.—If the plaintiff offers in evidence a part of the record in another action, the defendant may call for, and read, the remainder of it, without waiving his right of demurrer to the evidence. (p. 826.)

PRACTICE—Demurrer to the Evidence—Cross-examination does not Waive Right to Interpose.—On cross-examination, the defendant may bring out any matter pertinent to the issue, and by the exercise of such right he does not waive his right of demurrer to the evidence. (p. 826.)

LIBEL AND SLANDER—Special Damage, When not Required.—If defamatory words falsely spoken of one prejudice him in business or occupation, they are actionable without proof of special damage. (p. 827.)

LIBEL AND SLANDER—Words, When Actionable.—To say of a contractor that, in completing a building, he will put in a grade of material inferior to that called for in the specifications is slanderous, and, if false, actionable. (p. 827.)

LIBEL AND SLANDER.—An Absolutely Privileged Communication is one in respect to which, by reason of the occasion on which it is made, no remedy can be had in a civil action. (p. 827.)

LIBEL AND SLANDER.—A Conditionally Privileged Communication is one made on an occasion which furnishes a prima facie lawful excuse for the making of it, and is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse. (p. 827.)

LIBEL AND SLANDER by a Witness in the Course of Judicial Proceedings.—Though the words spoken by the defendant were false and malicious, they are privileged and are not actionable, if

they were spoken by him as a witness in a judicial proceeding and were pertinent and relevant to the fact of inquiry therein or responsive to questions propounded by counsel while the defendant was being examined as a witness, though he was not a party to the action. (p. 830.)

LIBEL AND SLANDER—Words Spoken by a Witness, When not Actionable Because Pertinent to an Inquiry in a Judicial Proceeding.—If, in a judicial proceeding, a question arises and is put to a witness, whether A is a reliable contractor, and the witness responds that A has not paid some bills contracted last year, and that, in completing a contract, he will put in a grade of material inferior to that called for in the specifications, this answer, though false and actuated by malice, is absolutely privileged, and no action can be sustained against the witness therefor. (p. 831.)

Green & Shields, for Cooley.

Templeton, Carlock & Templeton, for Galyon.

⁴ **SHIELDS, J.** This is an action to recover damages for alleged slanderous words spoken by Cooley, the plaintiff in error, of and concerning Galyon, the defendant in error, while being examined as a witness before the master upon a reference to ascertain damages resulting from the wrongful suing out of an injunction issued in the case of Eckle et al. against the Florence Crittendon home, lately pending in the chancery court of Knox county. Galyon and Cooley were both contractors and builders residing in Knoxville, and neither was a party to the chancery cause.

The declaration contains two counts—one in slander and one in libel—both predicated upon the same words, which are hereinafter set out, in stating the averments of a special plea filed by the defendant. It is averred that the words were falsely and maliciously spoken and published of and concerning the plaintiff, with respect to his occupation and business as a builder and contractor, to his damage, five thousand dollars.

The defendant filed a plea of not guilty, and a special plea in which he says that he uttered the language complained of while being examined as a witness in a suit pending in the chancery court of Knox county, styled "G. B. Eckle et al. v. Florence Crittendon Home," in answer to questions put to him by counsel in the said cause; that the bill in said cause was filed to enjoin the Florence Crittendon Home from completing a house then in course of construction, ⁵ and designed as a home for fallen women; that an injunction was issued in said cause, and remained in force until the cause was heard and the bill dismissed; that upon a reference to the master to hear proof, and

report what damages, if any, the Florence Crittendon Home had sustained by reason of the wrongful suing out of said injunction, it was proven that at the time the injunction was issued, the Florence Crittendon Home had awarded the contract for the building of said house to Thomas & Turner, contractors, for the contract price of two thousand four hundred and ninety-seven dollars, and that after the dissolution of the injunction they refused to carry out the contract, because of an advance in wages and material, unless the Florence Crittendon Home would pay them the additional sum of three hundred and three dollars and ninety cents; that the complainants, Eckle and others, claimed that Galyon, who was alleged to be a reliable contractor, was then offering to do the building for the original contract price of two thousand four hundred and ninety-seven dollars, and that therefore the defendant was not damaged by the wrongful suing out of the injunction; that upon this reference the defendant, who was in no way interested in or connected with said litigation, was called and sworn as a witness in behalf of the Florence Crittendon Home, to prove the advance in the price of labor and material, and on cross-examination by the complainant's solicitors, he was asked questions and made answers thereto, as follows: "Q. Is Mr. Galyon a reliable contractor? A. I know Mr. ⁶ Galyon hasn't paid us for some bills that he bought last year. We would not sell him lumber to-day without cash. Q. He is considered reliable with respect to his work, is he not? A. That depends on how broad a sweep you give the word 'reliable.' If you mean he faithfully performs all his contracts in every particular, I must say he is not reliable. In other words, I will be a little more explicit. He will complete a contract, and put in an inferior grade of material than what is called for in the specifications"; that these answers had reference to the said inquiry, and were fairly responsive to the questions asked him by counsel; and that they were absolutely privileged under the law. He denies that he uttered the words maliciously. While this defense could have been made under the general issue, it could also be made by special plea: *Shadden v. McElwee*, 86 Tenn. 148, 6 Am. St. Rep. 821, 5 S. W. 602.

Issue was joined, and the case was tried by the circuit judge and a jury, and upon the trial the plaintiff introduced the solicitor of the complainants in the cause of Eckle and others against the Florence Crittendon Home, as a witness in his behalf, and had him identify the original bill, the answer, the de-

cree denying the complainants' relief, and ordering the reference to the master to ascertain the damages sustained by the defendant by reason of the wrongful issuance of the injunction, and ⁷ the deposition given by defendant, Cooley, in the chancery cause, the original papers being used by consent, all of which were then read in evidence by the plaintiff.

Upon cross-examination the witness identified the depositions of other witnesses taken in the cause, the report of the master allowing damages to the defendant in that cause, and the decree confirming the same, which were then read to the jury by defendant's attorney. Other evidence was introduced by the plaintiff tending to prove that the defendant gave the deposition read, and entertained malice toward the plaintiff.

The proof introduced by the plaintiff sustained the averments of the special plea, and upon the conclusion of plaintiff's evidence the defendant filed a demurrer, in proper form, thereto, which was overruled by the court, and the damages of the plaintiff assessed by the jury at five hundred dollars, and judgment given therefor; and the defendant has brought the case before this court, and assigns error.

For the plaintiff it is said that the defendant, by calling out and reading in evidence those portions of the record in the chancery cause which the plaintiff had not offered, introduced original evidence in his behalf, and lost his right to demur to the evidence of the plaintiff, and that for this reason the action of the court in overruling the demurrer was correct, regardless of other questions. It is true that, ⁸ if a defendant introduce any original evidence in his behalf, he cannot demur to the evidence of the plaintiff; but can it be said that the evidence elicited by the defendant in this case was original evidence? Clearly not. The plaintiff had introduced part of the record in the chancery cause, and it was perfectly competent for the defendant to call for the remainder of it. It would have been the better practice to have required the plaintiff to read the entire record; but, having failed to do so, the defendant had the right to call for the rest of it, and examine the witness then upon the stand in relation to it. This was legitimate cross-examination, in the strictest sense, as the evidence brought out related to and was germane to that elicited in the examination in chief. But whether germane or not, the defendant had the right to bring out upon cross-examination any matter pertinent to the issue, the rule in Tennessee being that the cross-examination is only

limited by relevancy and competency of the evidence sought to be introduced, and the defendant, by exercising this right, is not precluded from demurring to the evidence. This question was fully discussed in the case of *Sands v. Southern Ry. Co.*, 108 Tenn. 1, 64 S. W. 478, and the rule there stated as here applied.

The question upon which this case must be determined is whether the language imputed to the defendant is actionable. It is well settled that defamatory ⁹ words falsely spoken or written of one, which prejudice him in his business or occupation, are actionable, without proof of special damage; and, therefore, the publication of the words imputed to the defendant, other questions out of the way, would entitle plaintiff to recover: *Bank v. Bowdre*, 92 Tenn. 723, 23 S. W. 131; *Mattson v. Albert*, 97 Tenn. 232, 36 S. W. 1090. The defendant, however, insists that the words here spoken and published are absolutely privileged, on account of the occasion when done, regardless of the presence of malice, the only inquiry allowed being whether they were pertinent to the issues involved in the cause in which the defendant was examined as a witness, and fairly responsive to the questions propounded to him by counsel; while for the plaintiff it is said that the words are only qualifiedly or conditionally privileged, and, malice appearing, they are actionable. The question is, therefore, presented whether the answers of the defendant in question are absolutely or only conditionally privileged.

"By an absolutely privileged communication," says Mr. Townshend in his work on Slander and Libel, "is not to be understood a publication for which the publisher is in no wise responsible; but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action or libel. A conditionally privileged communication is a publication made on an occasion ¹⁰ which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse": Townshend on Slander and Libel, p. 248, sec. 202, cited and approved in *Ruohs v. Backer*, 6 Heisk. 405, 19 Am. Rep. 598. In *Odgers on Libel and Slander*, 191, it is said: "A witness in the box is absolutely privileged in answering all the questions asked him by counsel on either side; and, even if he volunteers an observation (a practice much to

be discouraged), still, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously, for his own purposes, would not be privileged, and would also probably be a contempt of court." This statement of the law is quoted and approved by this court in the case of *Shadden v. McElwee*, 86 Tenn. 150, 6 Am. St. Rep. 821, 5 S. W. 602. In the case of *Lea v. White*, 4 Sneed, 113, 115, it is said: "There is a class of cases which are absolutely privileged, and depend in no respect for their protection upon their bona fides. The occasion is an absolute privilege, and the only questions are, whether the occasion existed, and whether the matter complained ¹¹ of was pertinent to the occasion. In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good that the law holds that nothing which may be therein said with probable cause, whether with or without malice, can be slander, and in like manner, that nothing written with probable cause under the sanction of such occasion can be libel. The pertinency of the matter to the occasion is that which is meant by 'probable cause,' and probable cause is, in this class of absolutely privileged communications, what 'bona fides' is to the class of conditionally privileged communications, which, we have seen, are protected unless there is malice in fact."

In the case of *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 986, the court said: "While there is some conflict in the adjudged cases as to whether witnesses are absolutely exempt from liability to an action for defamatory words uttered or published in the course of judicial proceedings, it is agreed by all the authorities that they are presumptively so; and, before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and not in response to questions asked by counsel."

¹² In the same case the court further said: "In this country many, and perhaps a majority, of the courts, have refused to adopt an absolute and unqualified privilege of a witness, as laid down by the English courts; but it is agreed that a witness is absolutely privileged as to everything said by him having relation or reference to the subject of inquiry before the court,

or in response to questions asked by counsel, and presumptively so as to all his statements": *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 986.

In the case of *Hoar v. Wood*, 3 Met. (Mass.) 193, the court said: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and, therefore, if spoken elsewhere, would import malice, and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such case, is not whether the words spoken were true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relative and pertinent to the cause or subject of inquiry."

In the case of *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 197, 9 South. 108, it is said: "Certain communications are absolutely privileged, and no person is liable, either civilly or criminally, in respect of anything published by him in the course ¹³ of his duty in any judicial proceeding. This privilege extends to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, to proceedings in legislative bodies, and to all who, in the discharge of public duty, or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation": Citing *Heard on Libel and Slander*, secs. 90, 103, 110; *Newell on Defamation*, 423, secs. 26, 27; *Fisk v. Soniat*, 33 La. Ann. 1400; *Vinas v. Merchants' etc. Ins. Co.*, 33 La. Ann. 1265.

The case of *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. 602, is relied upon as supporting the position of the plaintiff, but it does not do so. That case was before this court upon the demurrer interposed by the defendant to the replication of the plaintiff to a plea averring that the words upon which the action was predicated were uttered while the defendant was being examined as a witness in a certain suit, in response to questions propounded to him, and that his answers were responsive and privileged, replying that the words were not uttered in response to questions asked defendant while on the witness-stand, and that they were not pertinent to the issues in said suit, but were voluntarily injected into his testimony, and falsely and maliciously spoken for the purpose of injuring the plaintiff, and the demurrer was properly overruled. But it is there expressly held, upon the authority of *Lea v. White*, 4 Sneed, 113, and *Odgers on Slander and Libel*, above-

cited, ¹⁴ which are quoted and approved in the opinion of the court, that when the communications of a witness are fairly responsive to the questions propounded, or pertinent to the inquiry, they are absolutely privileged, although he may have entertained malice toward the plaintiff. It is immaterial that neither the plaintiff nor the defendant were parties to the cause in which the defendant was called to testify. The majority of witnesses are not parties to the cases in which they are examined, and facts in relation to other strangers to the litigation often become the subject of necessary inquiry. If the privilege was confined to parties, it would be reduced to narrow limits, and the proper administration of justice would be greatly embarrassed and made difficult.

Applying these principles to this case, the question is not whether the words spoken by the defendant were false and malicious, but were they spoken in a judicial proceeding, and were they relevant and pertinent to the subject of inquiry in that proceeding, or responsive to questions propounded to the defendant by counsel while being examined therein as a witness? If they were, they are absolutely privileged, and the plaintiff's action must fail.

That the words were spoken in the course of a judicial proceeding is conceded; and the only question that remains to be determined is, Were the answers of the witness pertinent to the inquiry, or responsive to the questions ¹⁵ asked by the counsel? The issue being tried in the chancery cause, in relation to which the defendant was examined as a witness for the Florence Crittendon Home, was what damages it had sustained by being delayed in building a house by the injunction issued against it; and defendant was called to testify as to the difference in the cost of material and construction at the time the injunction was issued and when the bill was dismissed, as bearing upon this issue. The plaintiff, Galyon, had offered to build the house for the same price for which the defendant had contracted it when enjoined, and the question arose whether he was a reliable contractor, and would and could comply with a contract to do the building if it were let to him; and, with a view of proving this, the witness was cross-examined by the solicitor for the complainants, and made the answers of which the plaintiff complains.

These answers were clearly pertinent to the investigation. If Mr. Galyon was a reliable contractor, his proposition to

build the house tended to prove that the defendant had sustained no loss; and, if he was unreliable, the effect of the proposition as evidence was weakened. The answers were also fairly, and evidently intended to be directly, responsive to the questions propounded to the witness. If the plaintiff did not pay for the material he used in building, or did not use the character ¹⁶ of material called for in his contract, he was not a reliable contractor.

We are of the opinion that the words spoken by the defendant of the plaintiff were, on account of the occasion, absolutely privileged, and that no action can be maintained upon them. There is therefore no evidence to sustain a verdict against the defendant, and the demurrer to the plaintiff's evidence should have been allowed.

The judgment of the circuit court is reversed, the demurrer sustained, and the plaintiff's suit dismissed.

In *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, the question was presented, whether "a party to a judicial proceeding is liable to a stranger to the record for defamatory matter alleged in the pleading concerning him, or whether said matter, being pertinent and relative to the issue, is not absolutely privileged." The substance of the allegation complained of was that the plaintiff, though not a legal voter, had cast his vote at an election held for the purpose of determining whether the city of Nashville should subscribe to the capital stock of a railway company, and it was averred that such allegation was made falsely, recklessly, wantonly, and with actual malice, in bad faith, without proper cause, and not under such circumstances as to reasonably create a belief in the mind of the defendant that they were true.

A demurrer to the plaintiff's complaint having been sustained by the trial court and the suit dismissed, he appealed to the supreme court, which affirmed the judgment, saying:

"The determinative question of law arising upon the pleadings is whether the alleged defamatory matter was absolutely, or only conditionally, privileged. The rule on this subject at common law was thus stated by Mr. Townshend in his work on Slander and Libel, fourth edition, section 221, viz.: 'In a civil action, whatever the complainant may allege in his pleading in connection with his grounds of complaint, can never give a right of action for libel.' The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading by way of defense to the charge brought against him, or by way of countercharge, counterclaim, or setoff, can never give a right of action.' This rule was adopted in this state at an early day, but it was coupled with the qualification that the alleged defamatory matter

must be pertinent or material to the subject of inquiry in the particular litigation.

“In *Lea v. White*, 4 Sneed, 113, it was said, viz.: ‘The communications are, on account of the occasion on which they are made, *prima facie*, or, as the books have it, “conditionally privileged; that is, they do not amount to defamation (actionable) until it appears that the communication had its origin in actual malice in fact.” In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, malice in fact, and that the occasion was seized upon as a mere pretext.’ Illustrations of this class of communications are statements in respect of the character of servants, official communications, reports of judicial proceedings, etc. ‘But,’ continues the court, ‘there is another class of cases which are absolutely privileged and depend in no respect for their protection upon their *bona fides*. The occasion is an absolute privilege; and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good, the law holds that nothing which may therein be said with probable cause, whether with or without malice, can be slander, and in like manner that nothing written with probable cause under the sanction of such an occasion can be a libel. The pertinency of the matter to the occasion is that which is meant by probable cause, and probable cause is, in this class of absolutely privileged communications, what *bona fides* is to the class of conditionally privileged communications, which are protected unless there is malice in fact.’

“It will be observed that the cardinal inquiry is whether the alleged defamatory matter is pertinent to the issue involved. As said by this court in *Shadden v. McElwee*, 86 Tenn. 152, 6 Am. St. Rep. 821, 5 S. W. 604, ‘where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have entertained sentiments of malice to the adverse party.’ It is, moreover, the rule that the question of pertinency or relevancy is a question of law for the court: *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 6 Am. St. Rep. 821, 5 S. W. 602; *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795.

“It cannot be seriously controverted that the allegations of the bill in the United States circuit court with respect to the disqualifications of the plaintiff as an elector in the election of August 8, 1901, were pertinent and relevant to the matter of inquiry in that suit. The legality of the action was challenged in that proceeding upon the ground that the municipal aid subscription had not been carried by a three-fourths majority of the voters, as required by law. It was necessary that the bill should specifically recite the names of

the disqualified voters, in order that an issue might be made in respect to their qualifications: *Moore v. Sharp*, 98 Tenn. 493, 41 S. W. 587; *Blackburn v. Vick*, 2 Heisk. 383.

“The name of the plaintiff was included in a list of about fifty citizens of the twentieth ward, who were alleged to have been disqualified to vote in said election on account of failure to re-register after changing their residence in said ward twenty days before the election. The matter alleged being pertinent to the issue, it was absolutely privileged, and it is wholly immaterial whether the element of malice entered into the charge. As said in *Lea v. White*, 4 Sneed, 111: ‘It certainly cannot be maintained that, because a person is malicious in his statements toward the adverse party, he will not be permitted to set up in his defense any matter that he may reasonably suppose would be available.’

“It is alleged in the declaration there was no probable cause, or that defendant could not have reasonably supposed it necessary in his case to have alleged the libelous matter. It is said the demurrer admits this allegation. It is well settled that ‘a demurrer does not admit inferences from facts, nor conclusions of law averred’: 6 Ency. of Pl. & Pr. 336; *Park v. Kelly Axe Co.*, 1 C. C. A. 395, 49 Fed. 618; *Kent v. Lake Superior Ship Canal Co.*, 144 U. S. 75, 12 Sup. Ct. Rep. 650; *Foster’s Federal Practice*, sec. 106; *Hopper v. Town of Covington*, 118 U. S. 148, 151, 6 Sup. Ct. Rep. 1025; *Greeff v. Equitable Life etc. Soc.*, 160 N. Y. 19, 73 Am. St. Rep. 659, 54 N. E. 712.

“‘Averments in a declaration as to the meaning and interpretation of a writing attached thereto, or exhibited, are not admitted by a demurrer’: *National Park Bank v. Halle*, 30 Ill. App. 17; 6 Ency. of Pl. & Pr. 337, 397; *Foster’s Federal Practice*, sec. 106.

“‘Neither does a demurrer admit matters averred in the declaration contrary to law’: *Louisville etc. R. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. Rep. 193; 6 Ency. of Pl. & Pr. 338, 398; *Foster’s Federal Practice*, sec. 106; *Hooper v. Town of Covington*, 118 U. S. 148, 151, 6 Sup. Ct. Rep. 1025.

“As already seen, the pertinency of the matter to the occasion is that which is meant by probable cause. The pertinency of the matter to the issue presented is a matter for the court, and the demurrer does not admit the want of probable cause, or any other conclusion of law which must be drawn by the court. We think, as matter of law, the alleged defamatory matter was absolutely and unqualifiedly privileged.

“But it is insisted on behalf of plaintiff in error that the present case falls within an exception to the general rule which was recognized and established by this court in *Ruohs v. Becker*, 6 Heisk. 395, 19 Am. Rep. 598. In that case it was held that the rule as to parties does not apply to strangers to the record, and such statements, although pertinent, are only conditionally privileged. The

facts of that case were that Ruohs, as next friend of two young girls, filed a petition in the county court of Hamilton county, in which he asked the removal of their guardian upon the ground alleged that 'the guardian has had in his family a girl who is now probably over sixteen years of age, who came to live with him about the age of thirteen years, and has remained in his family ever since. Her reputation is ruined, and she is now an example of shame and prostitution.' The court said, viz: 'Having the undoubted right to present the petition, the question recurs, Was the reason assigned by the plaintiff in error to the county court for the removal of the guardian such a reason as he might lawfully assign, and his petition a privileged communication within the meaning of the law?

" 'Although there are authorities which would, perhaps, sustain the petition to the county court as falling within the definition of absolutely privileged communications, this court is of opinion that a distinction should be taken between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers to the record, and that the protection of private character, as well as the peace of society, require that imputations against persons having no connection with the judicial proceeding should, even when properly relating to such proceeding, be considered as falling within the class of conditionally privileged communications.'

" 'The case of Ruohs v. Backer, 6 Heisk. 395, 19 Am. Rep. 598, was decided in 1871 in an opinion delivered by Judge Nelson. It has not been reaffirmed, as erroneously stated by counsel, nor has it been distinctly overruled. In the recent opinion of this court in the case of Cooley v. Galyon (principal case), 109 Tenn. 1, ante, p. 823, 70 S. W. 607, a rule antagonistic to that laid down in Ruohs v. Backer, 6 Heisk. 395, 19 Am. Rep. 598, was announced. It was held in that case that slanderous words spoken by a witness in a judicial proceeding, which are relevant and pertinent to the subject of inquiry or responsive to questions, are absolutely privileged. The court said, viz.: 'It is immaterial that neither the plaintiff nor defendant were parties to the cause in which the defendant was called to testify. The majority of witnesses are not parties to the cause in which they are examined, and facts in relation to other strangers to the litigation often become the subject of necessary inquiry.'

" 'If the privilege was confined to the parties, it would be reduced to narrow limits, and the proper administration of justice would be greatly embarrassed and made difficult.'

" 'It was held in Henderson v. Broomhead, 4 Hurl. & N. (Eng. Ex.) 569, that no action lies against a party who in the course of a cause makes an affidavit which is scandalous, false and malicious, though the person scandalized and who complains is not a party to the cause. "This question was under consideration in the recent case of Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795, a case from Missouri, in

which the court said, viz.: 'With the exception of *Ruohs v. Backer*, 6 Heisk, 395, 19 Am. Rep. 598, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained.' Again, in the case of *Johnson v. Brown*, 13 W. Va. 136, the court wrote as follows: 'The English and American courts, as will be seen by reference to many of the authorities before cited, in laying down the rule which is to determine whether libelous matter appearing in the conduct or proceedings of a cause is or is not to be considered as absolutely privileged, appears to assume that it in no manner depends upon whether it relates to or was uttered about a stranger to the suit or otherwise.'

" 'While in many cases, as we have seen, qualifications are added in stating the rule which exempts from libel or slander suits utterances in the prosecution regularly of a suit, yet the qualification that they must not be uttered in reference to a stranger to the suit is never added. There is, nevertheless, one American case that decides that if a libelous statement, made in the course of judicial proceedings, is made in regard to a third person, such statement is not an absolutely privileged publication, but is only conditionally privileged, and is actionable if made with malice, without probable cause, and under such circumstances as would not reasonably create the belief that they were true'—citing *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598.

"Judge Nelson, in his opinion, states, viz.: 'If a guardian may be removed because his domestic associations are such as tend to the corruption and contamination of his ward, upon what principle is it that the person seeking his removal may not even name his associates and cause their character to be inquired into? There are many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry; and the right in this case,' continues Judge Nelson, 'is unquestionable.'

"If, then, the right to make the inquiry is material and pertinent, why should not the rule of exemption from liability, grounded on reasons of public policy, which favors a free and untrammelled investigation in courts of judicature, not apply when the allegation is made concerning a stranger, as if made against a party to the record? The exception undertaken to be made destroys the rule and defeats the objects of public policy upon which it was founded. It is not supported by any authority, but is contrary to the rule announced in all the cases, and should not be adhered to as a precedent.

“The fact that cases of hardship may arise, and persons who have been defamed in the course of judicial proceedings may be left remediless, is no reason why a wholesome legal principle, founded upon reasons of public policy, should be overthrown. A multitude of instances might be cited where the rights of the individual are required to be sacrificed for the public good.”

Privileged Communications, within the meaning of the law of libel and slander, are defined in *Trebbly v. Transcript Pub. Co.*, 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128. Communications made in the course of duty in judicial proceedings are privileged; the privilege extends to parties, counsel, witnesses, jurors, and judges: *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106; *Gore v. Condon*, 87 Md. 368, 67 Am. St. Rep. 352, 39 Atl. 1042; *Metcalf v. Times Pub. Co.*, 20 R. L. 674, 78 Am. St. Rep. 900, 40 Atl. 864. Some authorities hold that an action will not lie against a witness for slanderous words uttered by him in giving testimony, though false, malicious, and not responsive to the question asked: *Huckle v. Voneiff*, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, 17 Atl. 1056; other authorities hold that the statements of a witness or litigant, in order to be privileged, must be pertinent and material to the subject under investigation: *Clemmons v. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626; *Shadden v. McElwee*, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821, and note.

GORSUCH v. SWAN.

[109 Tenn. 36, 69 S. W. 1113.]

NEGLIGENCE—Presumption Arising from the Running Away of a Team.—When a team is found running away, unattended on a public highway, and doing damage to one lawfully thereon, negligence is *prima facie* imputable to the owner. (p. 837.)

Webb, McClung & Baker, for Gorsuch.

Charles T. Cates, Jr., and T. A. R. Nelson, for Swan.

³⁶ BEARD, C. J. The intestate of the plaintiff in error, while riding in a buggy on one of the public roads of Knox county, ³⁷ was fatally injured by a runaway team belonging to the defendant in error. This suit was brought by the administrator to recover damages upon the alleged ground that it was through the negligence of the defendant, the owner of the team, or of his servant, that this runaway occurred, and his intestate was injured. The trial resulted in a verdict for the defendant, and the plaintiff has appealed. The trial judge

said to the jury as follows: "In order that the plaintiff may recover in this case, it must be shown that the defendant or his servants were guilty of some negligence whereby this team of horses ran away and into the vehicle in which plaintiff's intestate was riding, and that such negligence was the prime, proximate and efficient cause of her injuries." This was a correct application of the general rule that the burden of proof is on the party (the plaintiff in this case) having the affirmative of the issue; but, as the evidence in the cause clearly established the fact that the horses of the defendant, attached to his wagon, were running away, unattended by a driver, at the time they did the injury, the plaintiff submitted a proposition to meet this phase of the case, which was declined by the court. This proposition is in these words: "The fact that a team of horses hitched to a wagon are found running upon the public highway, without a driver or anyone accompanying them, raises a presumption of negligence on the part of the owner of the horses ³⁸ that will make him liable for any injury that may directly and proximately result therefrom, unless he shall show by a preponderance of evidence that neither he nor his servant had been guilty of negligence in letting the horses get loose." It was insisted that, as the request embodied a sound rule of law, which was raised by the facts of the case, it was error in the trial judge to decline it. This presents the question whether, upon proof by the plaintiff of the accident occasioned by the team of the defendant running away, without a driver, on a public road, a *prima facie* case of negligence was made, so as, without more, to put the burden of explanatory evidence on the defendant, or, having established so much, it was the duty of the plaintiff to have gone further, and shown that there was negligence on the part of the defendant or his servant in permitting the horses to escape his control. While the authorities are not agreed, it would seem the sounder reason would authorize in such a case the application of the maxim, "*Res ipsa loquitur*," for it is of common experience that horses which are well broken and kept under control will not, save in exceptional cases, break away from the one in charge of them, and inflict injury. So, when a team is found running away, unattended, upon a public thoroughfare and doing hurt to one lawfully thereon, we think from this fact alone negligence is *prima facie* fairly imputable to the owner. This was the view taken ³⁹ by the court in *Thane v. Douglass*, 102 Tenn.

307, 52 S. W. 155, a case which warranted the request in question, and announced a rule which should be adhered to, unless good reason can be shown for a departure from it. This view we find enforced by Judge Thompson in his Commentaries on the Law of Negligence, the first edition of which is now going through the press. In volume 1, section 1297, he says "that horses which are roadwise, and fit to be driven on the street or highway, and which are properly driven and cared for, do not, as a general rule, run away. From this fact the conclusion is fairly deducible that if a horse or a team of horses, while unattended on the street or highway, does damage, it constitutes prima facie evidence of negligence, to charge the owner, driver or custodian, in the absence of an explanation on his part satisfactory to the jury."

In support of his text he cites a number of cases, among which are *Unger v. Forty-second Street etc. R. R. Co.*, 51 N. Y. 497, and *Strup v. Edens*, 22 Wis. 432. Both cases involved the question of the owner's liability for injury inflicted by runaway teams. In the first, the supreme court of New York said: "The fact that the horses were unattended and unfastened in the street was, unexplained, evidence of the negligence against the defendant"; and in the second, the rule is stated in these words: "The fact that the horses got loose and ran away is some evidence of negligence. ⁴⁰ It is true such a thing might occur notwithstanding due care in hitching. But such would not be the ordinary result, and, unexplained, the reasonable inference from the first would be that there had been negligence in fastening the horses."

In the case at bar, in a development before the jury, it appeared that the defendant's servant had driven his master's horses to a public watering place, where, leaving them unhitched and unattended, they ran away, inflicting the injuries complained of. Yet in a great many cases it would be impossible for the plaintiff to show negligence unless the maxim of "*res ipsa loquitur*" was applied, while possibly in all cases it would be within the power of the owner to rebut the presumption of negligence by showing that the runaway was not the result of a lack of care, either on his part or on that of his servant; and to put this burden on him is no great hardship. Nor is there any antagonism between this holding and that of *Young v. Bransford*, 12 Lea, 232. In that case injury resulted from an explosion of the boiler used in a sawmill, while its

owner was carrying on his lawful business, and this court, reversing the trial judge, held that negligence would not be imputed to the owner from the mere fact that the killing resulted from its explosion. It is there said that the reasonable rule was the one announced by Judge Wallace in *Rose v. Transportation Co.*, 21 Am. Law Reg. 522, as follows: "That from the mere fact ⁴¹ of an explosion it is competent for the jury to infer as a proposition of fact that there was some negligence in the management of the boiler, or some defect in its condition; but that it ought not to have the weight of a conclusive presumption, whether of law or fact, so as to compel the defendant, in order to avoid liability, to prove affirmatively that they were guilty of no negligence, and that the accident was unavoidable."

In the course of the opinion, and after an exhaustive review of the authorities, Judge Cooper concluded "that the question of the effect of the mere proof of the killing of the plaintiff's husband by the explosion of the defendant's boiler is one of grave doubt and great importance."

The reason for the court's declining to apply the maxim of "*res ipsa loquitur*" to such a case, and the adoption of the more restricted rule, is found in what immediately follows: "Steam," it has been well said, "has come into such general use as a motive power. not only in the operations of commerce and manufactures, but even in those of agriculture, that a rule of law making those who employ it insurers of the safety of others against damages arising from its use would not only be contrary to the analogies of the law, but would impose serious restraints upon the most necessary and beneficial industries. Both the proprietor of machinery impelled by steam and the engineer in charge of such machinery have the ⁴² strongest interest for watching over its safety. The property of one and the life of the other depend upon constant vigilance in this regard. These motives will ordinarily secure that degree of skill and attention which the safety of the public demand, without the aid of a rule making the proprietor liable in any event for damages from an explosion." We think that that case is thus easily distinguished from the present, where the injury results from animals generally susceptible to control, and, when looked after by their master with ordinary prudence, are unlikely to inflict injury either on the property or person of another. We, therefore, hold that the trial judge was in error

in declining to give the special request. The judgment is therefore reversed, and the case is remanded for a new trial.

Other errors are assigned, but, without passing on them, we are content to rest our reversal on the one indicated.

Whether Negligence is presumed from the running away of a team is considered in Creamer v. McIlvain, 89 Md. 343, 73 Am. St. Rep. 186, 43 Atl. 935; O'Brien v. Miller, 60 Conn. 214, 25 Am. St. Rep. 320, 22 Atl. 544; and whether leaving a horse in the street untied is negligence is considered in Belles v. Kellner, 57 N. J. L. 255, 91 Am. St. Rep. 429, 51 Atl. 700, 54 Atl. 99.

FIRST NATIONAL BANK OF GENEVA v. SHAW.

[109 Tenn. 237, 70 S. W. 807.]

CONTRACT—By What Law Controlled.—The law of the place where a contract is consummated by delivery or otherwise governs the construction of a contract made in one state to be performed in another, and not the place where it was signed. (p. 841.)

CONTRACTS—Place of Execution.—A note signed in Tennessee and forwarded to the payee in Ohio, and by its terms payable in that state, is a Ohio contract. (p. 841.)

MARRIED WOMEN—Contracts of.—In Tennessee, the contracts of a married woman are voidable and will not be enforced against her, when there is a plea of coverture. (p. 843.)

MARRIED WOMEN—Contracts of Made in Another State—Law of the Forum, When Controls.—A contract of a married woman made in Ohio, while she resides in Tennessee, and enforceable by the laws of the former, but not under the laws of the latter, will not support an action therein. The law of the forum controls. (p. 844.)

R. C. M. Cunningham and Chambliss & Chambliss, for the bank.

John C. Lock, for Shaw et al.

²³⁸ McALISTER, J. The only question presented for determination upon this record is the liability of the defendant Mrs. Stella V. Harley upon the following note:

"\$500.00.

Geneva, Ohio, Dec. 3, 1892.

"Six months after date, value received, we jointly and severally promise to pay to the First National Bank of Geneva, at their banking house, \$500.00 interest eight per cent after maturity. Interest paid to maturity \$17.50.

"D. H. HARLEY.

"STELLA V. HARLEY.

"M. P. SHAW."

Mrs. Harley, in her answer to the bill, avers that she was a married woman at the time said note was executed, and relies on the plea of coverture. She ²³⁹ further avers that she and her husband, D. H. Harley, were residents and living in the state of Tennessee at the time said note was executed, and had since continuously lived in this state, and she denies that the note was an Ohio contract.

The facts found by the court of chancery appeals are, viz.: 1. The note sued on is a renewal note. The original note was made June 6, 1891. It was renewed December 5, 1891; renewed again January 4, 1892, and again December 3, 1892, the note last renewed or made being the one in suit. 2. Previous to the execution of the first note, and since 1889, Mrs. Harley was a married woman, living with her husband continuously in Tennessee. She owned no property in the state of Ohio. 3. The weight of the proof is, and we so find as a fact, that she signed all the notes in Tennessee; and it is practically conceded, and, if not conceded, we find the fact to be, that she signed the note sued on in Tennessee. 4. The original note was negotiated in Geneva, Ohio. The note sued on was received by the bank of Geneva, Ohio, through the mail, from Chattanooga, Tennessee. 5. It is conceded that, under the statute law of Ohio, married women are liable in that state on their contracts.

It will be perceived that the legal question presented is whether a married woman, domiciled with her husband in Tennessee, is liable on a note signed by her in this state, but payable in the state of Ohio. The ²⁴⁰ first question, of course, to be determined, is whether, upon the facts found, this is a Tennessee or an Ohio contract. Says Mr. Tiedeman, in his work on Commercial Paper, page 506: "It is not the law of the place where the contract was signed or executed, but the law of the place where the contract was consummated, by delivery or otherwise, which governs the construction of the contract made in one state, to be performed in another. Thus, notes drawn in one state, and delivered and payable in another, for purchases made there, are governed by the law of the latter state, and are considered there made; for by delivery, only, the act of making is fully consummated." So it was said in *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. Rep. 154: "But where there is nothing to show that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance, that law must determine

the rights of the parties": *Hubble v. Morristown Land Co.*, 95 Tenn. 585, 32 S. W. 965. In 2 *Parsons on Contracts*, 586, it is said: "So if one in New York orders goods from Boston, either by carrier whom he points out, or in the usual course of trade, this would be a completion in the making of the contract, and it would be a Boston contract, whether he gave a note, or a note payable in Boston, or one without express place of payment." We think it quite plain that the note in suit is an Ohio contract, notwithstanding it was signed by Mrs. Harley ²⁴¹ in Tennessee, it having been delivered and consummated in Ohio, and is payable in that state, as the place of performance: *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. Rep. 473, 17 S. E. 14; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

The next inquiry is whether the plea of coverture to a note made in Ohio, valid and enforceable against a married woman in that state, is available in a suit on said note in this state, where such a contract is voidable at the election of the married woman. In *Story on Conflict of Laws*, chapter 4, section 103, it is said: "In regard to questions concerning infancy, competency to marry, incapacities incident to coverture, guardianship, and other personal qualities and disabilities, the law of the domicile of birth, or other fixed domicile is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done," or, as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern": *Story on Conflict of Laws*, secs. 103, 241.

Chancellor Kent, while at one time inclined to the doctrine of the civilians, afterward approved the doctrine which has just been quoted from Mr. Story: 2 *Kent's Commentaries*, 233, note, 458, 459, and note. The ²⁴² same doctrine was announced by this court in *Pearl v. Hansborough*, 9 *Humph.* 426, in an opinion by Judge Turley. Applying this rule, it was held in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, Mr. Justice Gray delivering the opinion of the court, that a contract of guaranty, signed by a married woman, domiciled with her husband in Massachusetts, and sent by mail to Maine, where it was accepted and acted on, was a contract made in the state of Maine, and, when sued on in the state of Massachusetts, would be determined by the law of Maine. In that case it appeared

that by the statutes of Maine, in force at the date of the contract of guaranty, the contracts of a married woman were valid and enforceable as if made by a feme sole, while the law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband. But it further appeared that, since the making of the contract sued on, and before the bringing of the action, the law of Massachusetts had been changed so as to enable married women to make such contracts. The court of Massachusetts therefore permitted a recovery against a married woman on the contract of guaranty made in Maine: See, also, *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251. But in Tennessee the contracts of a married woman are voidable, and will not be enforced against her when there is a plea of coverture. It would be a strange anomaly to hold ²⁴³ that such a contract made by a married woman in Tennessee would not be enforced by our courts, while the same contract, if made in another state, would be valid and enforceable.

As stated by Mr. Justice Gray, in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241: "As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. . . . It is possible, also, that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract."

While it is true, as contended by counsel in his very able argument, that the tendency of legislation in Tennessee is to enlarge the contractual power of married women, yet such power is very limited and circumscribed, and the settled policy of this state is to declare nugatory contracts made by her whenever her plea of coverture is interposed.

In *Bank of Columbia v. Walker*, 14 Lea, 299, it was held that the *lex loci contractus* would govern when not repugnant ²⁴⁴ to the *lex fori*. The court stated the rule to be: "Whether we consider the subject matter under the head of comity and its rules, or under that of real and personal statutes and its

rules, either or both sustain the position that the *lex loci contractus* as to relations and property rights will prevail over the *lex fori*, unless the enforcement of the former will work an injury to the subjects of the latter, or is prohibited by the laws of the latter."

It was further said that rights and contracts arising under the laws of a foreign state will not be enforced here, except under the doctrine of the comity of states, and that this doctrine neither requires nor sanctions the enforcement in the courts of this state of statutory rights and contracts arising under the laws of a foreign state which are repugnant to the policy and spirit of our laws.

For the reasons indicated, the decree of the court of chancery appeals is affirmed.

Conflict of Law as affecting the rights and obligations of married women is the subject of a monographic note to *Locke v. McPherson*, 85 Am. St. Rep. 552-578. For subsequent decisions on the same question, see *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 62 N. E. 672; *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 49 Atl. 544; *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443; *Baer Bros. v. Terry*, 108 La. 597, 92 Am. St. Rep. 394, 32 South. 353; *Mandell v. Fogg*, 182 Mass. 582, 94 Am. St. Rep. 667, 66 N. E. 198.

CHATTANOOGA LIGHT AND POWER CO. v. HODGES.

[109 Tenn. 331, 70 S. W. 616.]

NEGLIGENCE Must be the Proximate Cause of an Injury to sustain a recovery therefor. (p. 846.)

NEGLIGENCE—Proximate Cause—Injuries Received in Attempting a Rescue.—Where one person is exposed to peril of life or limb by the negligence of another, the latter is liable for injuries received by a third person in a reasonable effort to rescue the person so imperiled, if the rescuer does not rashly or unnecessarily expose himself to danger. (p. 846.)

NEGLIGENCE.—The Proximate Cause of an Injury is that act or omission which immediately causes or fails to prevent the injury; an act of omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted. (p. 848.)

NEGLIGENCE—Proximate Cause.—A wrongdoer is liable not only for an injury which immediately results from his act, but for such consequential injuries as, according to the common experience of man, were likely to result. It will be sufficient to fix liability on a wrongdoer if the particular result is one naturally connected, either immediately or through a series of events, with the original wrongful act. (p. 848.)

NEGLIGENCE—Proximate Cause, What is not.—Where a result is such that no reasonable man would expect it to occur, and no knowledge is shown in the person doing the negligent or wrongful act that such state of facts exists as to make the danger probable, the injury will not be regarded as actionable as against the wrongdoer. Especially is this true where the injury results from an act committed by the injured party, so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence. (pp. 848, 849.)

NEGLIGENCE—Proximate Cause—Interfering Act of the Plaintiff.—The plaintiff's interfering act, rather than the defendant's negligence, may be regarded as the proximate cause of the former's injury, whether he was guilty of contributory negligence or not, if it was unexpected and of a character which could not have been contemplated or foreseen and without which no injury would have occurred. (p. 849.)

NEGLIGENCE—Proximate or Intervening Cause, When a Question for the Court.—Where the facts are fairly inferable, the question of proximate or intervening cause is for the court. (p. 850.)

NEGLIGENCE—Proximate or Intervening Cause—Rash Exposure to Injury.—If one has been guilty of an act of negligence exposing his property to destruction by fire, and his employé, disregarding the expostulation of a third person characterizing his conduct as foolhardiness, leaves a place of safety and goes through fire and smoke to his mortal injury, this rashness, rather than the original negligence, is the proximate cause of his injury. Hence, no recovery therefor can be sustained against the employer. (p. 850.)

Brown & Spurlock, for Chattanooga Light and Power Company.

Richmond, Chambers & Head, for Hodges.

333 BEARD, C. J. This suit was brought by the defendant in error to recover damages for the death of his intestate, Milton Palmer, resulting, as is alleged, from the negligence of the plaintiff in error. There was a verdict and judgment in favor of the administrator for ten thousand dollars, and the case has been brought to this court by the light and power company.

334 The deceased was one of the engineers of the company, and at night had charge of its power-house engines and other machinery. While he was on duty, and about 9:30 P. M., fire was discovered in a framework cover of the electric wires which led up through the hallway to the room above, where they made their exit from the building. The fire rapidly spread, and occasioned the terrible injuries from which Palmer died. The theory of the plaintiff below was that negligence on the part of the defendant company in the use of combustible lumber in making this framework, and also in the location and condition

of these wires, occasioned the fire which fatally burned the deceased while he was discharging his duty in seeking to save the property of his employer.

The record shows that on discovering the fire, young Palmer, instead of sounding the alarm through a telephone in the building, ran to a house across the street, and sought to do so with a telephone located there. After an ineffectual effort to make connection, he abandoned it, and returned to the power-house. By that time the fire had spread until it was a serious conflagration. The flames and smoke were pouring out of the main entrance and the windows in that part of the building. There were other openings or doors into the power-house, but, seeing Palmer in the act of passing in through this main entrance, a policeman on the ground expostulated with him on what he characterized as foolhardiness." Disregarding the ³³⁵ expostulation, however, Palmer entered there, and went down the burning hallway into the telephone booth or box when it was on fire. Remaining there but a short time, he came out with his clothing aflame, and so horribly burned that in catching at himself the flesh parted or slipped from his hands. From these injuries he died.

This is a meager outline of the fire and its results, so far as they affect the present case. While the evidence attributing the origin of the fire to negligence of the company was attenuated, it may be assumed that, with its inferences, it was sufficient to preclude us, under the rule, from saying that there was not material evidence to support the verdict on this point. Assuming, therefore, that the jury were warranted in finding that the defendant company was guilty of such negligence, were they also warranted in finding that this negligence was the proximate cause of Palmer's fatal injuries? For there must be a concurrence of these essentials in order to maintain the present action.

It seems to be well settled that, where one person is exposed to peril of life or limb by the negligence of another, the latter will be liable in damages for injuries received by a third party in a reasonable effort to rescue the one so imperiled: *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Eckert v. Long Island R. R. Co.*, 43 N. Y. 503, 3 Am. Rep. 721; *Gibney* ³³⁶ *v. State*, 137 N. Y. 6, 33 Am. St. Rep. 690, 33 N. E. 142. But even in such a case the rescuer must not rashly and unnecessarily expose himself to danger: *Pennsylvania Co. v.*

Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172.

But whether the benefit of this rule is to be extended to one injured in an effort to save his own or another's property, exposed to danger by the wrongdoing or negligence of a third party, is a question that has provoked much difference of judicial opinion. Opposed to this extension are found the cases of *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721; *Morris v. Lake Shore etc. Ry. Co.*, 148 N. Y. 186, 42 N. E. 579; *Condiff v. Kansas etc. R. R. Co.*, 45 Kan. 260, 25 Pac. 562; *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Seale v. Gulf etc. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602. On the other hand, in *Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648, *Liming v. Illinois Cent. R. R. Co.*, 81 Iowa, 246, 47 N. W. 66, *Pullman Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, *Rexter v. Starin*, 73 N. Y. 601, and *Wasmer v. Delaware Co.*, 80 N. Y. 212, 36 Am. Rep. 608, the rule has been extended so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances.

In his charge to the jury the trial judge gave the ³³⁷ administrator of the deceased the benefit of the rule as announced in *Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648, and the other like cases. We do not, however, feel called on to choose determinately between the divergent decisions on this point, and certainly we are not prepared to say the trial judge was in error. But granting that he laid down the law correctly, the question recurs, Was the injury received by Palmer, which resulted in his death, the proximate result of the negligence of the plaintiff in error?

An examination of the cases will confirm the statement of Mr. Archibald Watson of the New York bar, in his recent and very valuable work, entitled "Damages for Personal Injuries," that "no branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of."

So great has this uncertainty been felt, that many courts have reached the conclusion that, at last, "to a sound judgment must be left each particular case": *Harrison v. Berkley*, 1 Strob. 547, 47 Am. Dec. 578. The same view was expressed by the supreme court of the United States in *Insurance Co.*

v. Tweed, 7 Wall. 49, in the following language: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided by the courts in a great variety of cases. It would be an unprofitable labor to enter into an ³³⁸ examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the nicest discrimination."

While there is much of practical truth in these statements, and the most careful study of the best text-books and opinions of courts will fail to discover an infallible guide, yet it will be found that all agree on certain general formulas or rules, which, though difficult of application in some, are of value in all, cases involving this question of proximate or remote cause.

In *Deming v. Cotton Press Co.*, 90 Tenn. 353, 17 S. W. 99, this court said: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted." This definition was approved in the later cases of *Telegraph-Cable Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633; *Railroad Co. v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902, 20 S. W. 312, and *Anderson v. Miller*, 96 Tenn. 35, 54 Am. St. Rep. 812, 33 S. W. 615.

In each of these cases, while the injury complained of was not the necessary effect of the particular act of negligence held to be the proximate cause, yet it was the natural result, and one which, in the face of ³³⁹ human experience, might well have been anticipated as possible, if not probable. In all of them the principle recognized was that a wrongdoer is liable not only for the injury which immediately results from his act, but for such consequential injuries as, according to the common experience of man, were likely to result.

But the consequential injury, according to the authorities, must be natural, "following upon the original wrongful act, in the usual, ordinary, and experienced course of events"; *Wiley v. West Jersey R. R. Co.* 44 N. J. L. 248; *Milwaukee etc. R. R. Co. v. Kellogg*, 94 U. S. 469. But it is to be observed that the result will not be unnatural, so as to relieve the original wrongdoer of responsibility, because he did not foresee or contemplate the precise consequence of his misconduct. It will be sufficient to fix liability on him if the particu-

lar result is one naturally connected, either immediately or through a series of events, with the original wrongful act: Watson on Damages and Personal Injuries, sec. 145.

On the other hand, where the result is such that no reasonable man would expect it to occur, and no knowledge is shown in the person doing the negligent or wrongful act that such a state of things exists as to make the damage probable, we think the rule is that the injury will not be regarded as actionable as against the wrongdoer: Sharp v. Powell, L. R. 7 Com. P. 253. And especially should this be true where the injury results from an act committed ³⁴⁰ by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence. In such a case it would seem impossible to find any ground upon which to maintain that the person guilty of the first act of negligence should be held liable to the party so injured, and the law, upon uncontroverted evidence showing such facts, without more, should relieve the original wrongdoer from liability. In such a case the intervening act of the party injured should be treated as the proximate cause of the injury: Seale v. Gulf etc. Ry. Co., 65 Tex. 274, 57 Am. Rep. 602; Pike v. Grand Trunk Ry. Co., 39 Fed. 255.

On this phase of the subject, Mr. Watson, in section 82 of the work already referred to, says: "It is not necessary, it is believed, to show that the plaintiff's intervening act, which may render the defendant's act the remote cause of the former's injuries, amounted to contributory negligence in law. Whether, in its character, the plaintiff's act is negligent or otherwise, it will, just as an intervening cause of any other nature, if unexpected, and of a character which could not have been contemplated or foreseen, and without which no injuries would have been occasioned, relieve of liability the author of the original wrong."

Now, in view of these general rules, which it would seem, are based on common fairness and right reason, where, upon the undisputed facts as disclosed in the record, rests the responsibility for the loss of young ³⁴¹ Palmer's life? Granting every inference indicating negligence on the part of the plaintiff in error which had to do with the origin of this fire, was the fatal injury sustained by him the natural or probable result therefrom? Could any reasonable man, though guilty of this negligence, have contemplated that one, from a place of safety, would go through flame and smoke to his mortal injury? Was

such an act within the bounds of human experience? Or was there an unbroken connection between the negligent act and the injury? On the contrary, was not this intervening act of the deceased, however heroic it may have been—one of extreme rashness, called for by no requirement of duty to his employer—the proximate cause of his death? Was it not an intermediate, efficient cause, operating to disconnect the fatal consequence from the original act of negligence? While ordinarily the answers to those questions would naturally fall within the province of the jury, and, when made in their verdict, would be regarded as binding, yet where the facts are fairly incontrovertible the question of proximate or intervening cause is for the court: *Holman v. Boston etc. Security Co.*, 8 Colo. App. 282, 45 Pac. 519; *Stone v. Boston etc. R. R. Co.*, 171 Mass. 536, 51 N. E. 1; *Bradley v. Ft. Wayne Ry. Co.*, 94 Mich. 35, 53 N. W. 915; *Butcher v. Hyde*, 152 N. Y. 142, 46 N. E. 305.

Whatever may hereafter be developed, at least on the record as it now is, we think these questions must ³⁴² be answered, as a matter of law, against the contention of the plaintiff below, and that the judgment must be reversed because of a lack of evidence to support the verdict on this material point. The case is remanded for a new trial.

The Doctrine of Proximate Cause is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. If one is injured in attempting to save his property from a fire negligently set by another, the setting of the fire is the proximate cause of the injury, and the injured person may recover therefor if free from contributory negligence, but not if he rashly, recklessly, and unnecessarily exposes himself to danger: *Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648. Compare *Cook v. Johnson*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Seale v. Gulf etc. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602. So the law has so high regard for human life, that it will not impute negligence to an attempt to save it, unless made under such circumstances as to constitute rashness. See the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 849; *Corbin v. Philadelphia*, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, and cases cited in the cross-reference note thereto; *West Chicago St. R. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226, 58 N. E. 367; *Becker v. Louisville etc. R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459, 61 S. W. 997.

NEAS v. BORCHES.

[109 Tenn. 398, 71 S. W. 50.]

CONSTITUTIONAL LAW—Class Legislation—When Sustainable.—A statute is not objectionable as class legislation because it applies only to merchants, if it is a mere regulation of mercantile business, designed to secure to the creditors of merchants a just participation in the distribution of their assets and prevent fraudulent transfers and practices by them. (p. 853.)

CONSTITUTIONAL LAW—Sales in Bulk or of an Entire Stock of Goods.—A statute providing that the sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against creditors of the seller, unless five days before the sale, the seller and purchaser make a full and detailed inventory showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller of each article included in the sale; and in good faith, make full, explicit inquiry of the seller as to the names and places of residence or place of business of each of the creditors, and at least five days before the sale, in good faith, notify, or cause to be notified, personally or by registered mail, each of such creditors of whom the purchaser has knowledge, or may, with the exercise of reasonable care, acquire knowledge, of the proposed sale and of the cost price of the merchandise, is a valid exercise of the police power of the state. (p. 853.)

H. N. Cate and W. B. Hooper, for Neas.

W. J. and W. D. McSween, for Borches.

399 WILKES, J. This is an action of replevin, brought before a justice of the peace, for sixty-seven pairs of shoes, valued at sixty-seven dollars, levied upon by attachment in the hand of Neas, sheriff, in favor of Donaldson Bros.

On appeal to the circuit court the cause was heard by the judge without a jury, and there was judgment for the plaintiffs, Borches & Co., and Donaldson Bros. appealed to this court, and assigned errors.

It appears that Driscoll & Co. were engaged in business as retail merchants at Given, Tennessee, and while so engaged became indebted to Borches & Co., of Knoxville, and to Donaldson Bros., of Morristown, both being wholesale merchants, and both having sold goods to Driscoll in the course of his business. Toward the last of August, 1901, Cureton, traveling salesman for Borches & Co., demanded payment of the amount due that firm from Driscoll & Co., and, it not being paid, proceeded to buy from Heritage, the clerk of Driscoll & Co., the entire stock of Driscoll & Co., except a few odds and ends of

no material value. This was done without any notice by the seller or purchaser to the creditors of Driscoll & Co. It does not appear that there was any fraud in the sale, nor that it was contrary to the wish of the firm, nor that it was not approved and ratified by the firm. On the contrary, Heritage says without objection that he had authority to sell the goods and pay the debts of the firm, and he sold for the purpose of paying the debt of Borches & Co.; and ⁴⁰⁰ Driscoll & Co. are not complaining or calling the sale in question. Thereupon Donaldson & Co. caused attachment to be levied upon sixty-seven pairs of shoes embraced in the sale to Borches & Co., and which had been delivered to them. Borches & Co. replevied the shoes, and claim to hold the same under their purchase. The contention in the case is that the purchase was void under the provisions of acts of 1901, chapter 133. The trial judge held this act unconstitutional, and that Driscoll & Co., through their agents, had made a valid sale. The act in question is chapter 133 of the acts of 1901, and is as follows:

Caption: "An act to provide the terms upon which sales in bulk of stocks of merchandise, or of any portion thereof otherwise than in the ordinary course of trade may be made.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full detailed inventory, showing the quantity, and so far as possible, with the exercise of a reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless such purchaser shall at least five days before ⁴⁰¹ the sale, in good faith, make full, explicit inquiry of the seller as to the names and places of residence or place of business of each and all of the creditors of the seller, and unless the purchaser shall at least five days before the sale, in good faith, notify or cause to be notified personally or by registered mail, each of the creditors of the seller of whom the purchaser has knowledge, or can, with the exercise of reasonable diligence, acquire knowledge, of the proposed sale and of the cost price of the merchandise to be sold, and the price proposed to be paid therefor by the purchaser; and the seller shall at least five days before such sale, fully and

truthfully answer in writing each and all of said inquiries; provided, however, no suit shall be brought or maintained by any creditor against such seller or purchaser within five days after he receive notice from any source of the intended sale and purchase, and any suit so brought shall be dismissed at the cost of the plaintiff in the case.

"Sec. 2. Be it further enacted, that whenever a notice as provided in section 1 of this act is sent by registered mail, the creditor of person to whom the notice is mailed shall be presumed conclusively to have received the notice, and the time of the notice shall be dated from the time of the mailing and registration of said notice."

It is said, in the first place, that the act is class legislation, in that it applies alone to merchants dealing in merchandise, and not to other persons, such ⁴⁰² as farmers, stock dealers, manufacturers, traders, and persons engaged in other business than the sale of merchandise. Admitting this, in reply it is said that the statute is a mere regulation of the mercantile business designed to secure to creditors of merchants a just participation in the distribution of the assets of such merchants, and to prevent fraudulent performances and practices by them, and is a valid exercise of the police power of the state.

The majority of the court is of opinion that the act in question is valid and constitutional; that it was intended to prevent the practice of fraudulently selling out goods to the injury of creditors by merchants; that it is merely a regulation of the business of merchandising; that it is not class legislation, and that the limitation of the act to merchants is not arbitrary classification; that it does not take away the property of the citizen, but only regulates the sales of merchandise in such manner as to prevent fraud. The result is that the judgment of the court below must be reversed, and, it being a replevin suit before a justice of the peace, judgment must be rendered for twice the value of the goods replevied, to wit, the sum of one hundred and thirty-four dollars, and all costs, in favor of the defendants, and against the plaintiff, which judgment may be discharged by a return of the shoes.

Mr. Justice Wilkes Dissented from the opinion of the majority of the court, on the ground that the statute in question was clearly vicious class legislation, and took away the value of the merchant's property by trammeling its sale, and that its provisions were not jus-

tified or warranted by the exercise of the police power of the state. He admitted the difficulty of determining what objects fell within the police power, but was of the opinion that the power could not be extended so as to prevent the disposition of property in any manner which the owner saw proper, if the disposition did not endanger the public safety, peace, health, or happiness. The statute in question, he insisted, embraced all sales of merchandise otherwise than in the ordinary course of trade in the general and usual prosecution of the seller's business, whether he was solvent or insolvent, and whether he acted in good faith or for a fraudulent purpose, unless notice was given, as in the act required, and that the result of this was to compel every merchant, whether solvent or insolvent, to obtain the consent of all his creditors before he could close out his business for any purpose or at any price. He relied upon section 8 of article 1 of the constitution of the state, declaring that "no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land," and insisted that, while the effect of the statute was not to take away property, it did restrict and burden a merchant's property in such a way as to prevent its free transfer and the realization of its value, thereby taking away one element of its value, namely, the right to use and legitimately dispose of it.

A *Statute* very similar in its terms to the one passed upon in the principal case is pronounced constitutional in *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37.

MATTHEWS v. CAPSHAW.

[109 Tenn. 480, 72 S. W. 954.]

POWERS OF SALE—Special, How Must be Pursued.—Where a special power of sale is given, to be exercised only on the happening of a certain event, it can be executed only in the mode, at the time, and upon the conditions prescribed in the instrument creating it, and the purchaser must, at his peril, ascertain whether the contingency upon which the sale is authorized existed. This rule applies only where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, which may be ascertained by anyone with equal certainty. (pp. 856, 857.)

POWERS OF SALE.—Where the condition upon which a power of sale is to be exercised is such that the determination, whether it has been fulfilled or not, requires the exercise of judgment and discretion, as to which there may be an honest difference of opinion, the decision of the donee of the power, in good faith and without notice to an innocent purchaser, will not be set aside, though it may afterward appear that his judgment was erroneous. (p. 857.)

IF A POWER of Sale is to be Exercised if a Necessity for so Doing Arises, the judgment of the donee of the power as to the necessity is conclusive in the absence of fraud. (p. 859.)

POWER OF SALE.—Though a Power of Sale is not Exercised in Good Faith, the title of the purchaser is not thereby affected, unless collusion or guilty knowledge can be traced to him. (p. 859.)

POWERS OF SALES Given in Wills Should Receive a Liberal Construction in order to carry out the purpose and intent of the testator. (p. 860.)

POWER OF SALE—Conveyance, When Deemed to be in Execution of.—Where the owner of a life estate is vested with a power of sale and executes a conveyance purporting to convey in fee, but without referring to the power, its exercise will nevertheless be presumed. No express recital of the power is required. (p. 861.)

Bryant & McBroom and F. T. Fancher, for Matthews et al.

Algood & Finley and R. P. Capshaw, for Capshaw et al.

⁴⁸² **SHIELDS, J.** Complainants, children and devisees of Lawrence Matthews, deceased, bring this bill to assert their title in remainder upon the falling in of the estate of their mother, Mrs. Agnes Matthews, for her own life, now outstanding, in certain valuable lots in ⁴⁸³ Cookeville, Tennessee, and to have declared void and inoperative a deed made by Mrs. Matthews, purporting to convey the property in fee to Simeon Hynds.

Lawrence Matthews made his will in 1860, and died in 1874, the owner of real and personal property including that in question, and leaving Agnes Matthews, his widow, and complainants (twelve in number), his children, surviving. His will was duly admitted to probate, and John F. Matthews and Mrs. Agnes Matthews, the executor and executrix, therein named, were qualified.

The first clause of the will is in these words: "1. If my wife, Agnes, should live longer than I do, I want, at my death, all of my just debts to be paid, and then I want my wife, Agnes, to have all my lands and negroes and effects during her life or widowhood, and that in case of necessity, I authorize my wife, Agnes, to sell any properties or lands or negroes, as same as I could for myself, for the benefit of the family." The other clauses contain some small bequests to certain of his children, and a special provision that all of his children shall be made equal in the distribution of his estate.

On November 5, 1877, Mrs. Agnes Matthews conveyed the property in controversy, for a valuable consideration in hand

paid, to Simeon Hynds, in fee, with formal covenants of seisin, good right to convey, and general warranty; and through several intermediate conveyances, purporting to convey in fee, made for ⁴⁸⁴valuable considerations paid, and without notice of the claim now attempted to be asserted, the several defendants now have possession and claim title to the property. The deed to Simeon Hynds contains no reference to the will of Lawrence Matthews, or the power of disposition of his property therein given his wife.

At the time this conveyance was made Mrs. Matthews was in possession of some five or six hundred acres of land, and had some money and other personal property; but the condition of the estate of the testator and of the several complainants does not fully appear, save that the personal estate was evidently small, and the children had not been advanced equally. Mrs. Matthews who is now about ninety years of age, was examined as a witness, and testified that she sold the property because she thought she had the right to do so, and that she accounted for the proceeds in a settlement she made as executrix some nine years afterward. There is no charge of fraud or unfairness in connection with the sale and conveyance of the lots.

The complainants insist that the power of sale vested in Mrs. Matthews was a limited power, to be exercised only upon the happening of a certain contingency, and that she was not authorized to convey the property of the estate unless a necessity for such sale arose, and that, under the facts above stated, no such necessity existed when the sale was made to Simeon ⁴⁸⁵Hynds, and, further, if a necessity did exist, the power given her was not exercised, since the deed contains no express recital that it was her intention to execute it, and the presumption is that she only intended to convey her estate for life, and for these reasons her conveyance was only effective to pass her life estate; that they are the rightful owners in the remainder of the fee to the property; and they bring their bill to have this adjudged and the conveyance of Mrs. Matthews, so far as it purports to convey the fee, declared a cloud on their title, and removed.

The general rule of law, unquestionably, is that, where a special power of sale is given, to be exercised only upon the happening of a certain event, made a condition precedent, it can be executed only in the mode, at the time, and upon the conditions prescribed in the instrument creating it, and the purchaser must, at his peril, ascertain whether the contin-

gency upon which the sale is authorized exists. This rule is recognized and adhered to by this court in all cases proper for its application, and it is not necessary to cite authorities to sustain it. But the rule only applies where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, such as majority or marriage of someone named, which may be ascertained by anyone with equal certainty. It does not apply and is not the law where the condition is such that the determination whether it has been fulfilled, or not, requires ⁴⁸⁶ the exercise of judgment and discretion as to which there may be an honest difference of opinion; and in cases of this character the decision of the donee of the power is conclusive of the question, and a sale made in pursuance of the power, in good faith or without notice to innocent purchasers, will not be set aside, although it may afterward appear that the judgment of the donee was erroneous. This distinction is well established by the authorities.

Chief Justice McIver, of the supreme court of South Carolina, in a well-reasoned opinion in a case involving this question, said: "It is quite clear that the power of sale was a conditional one, and it is equally clear that the condition was, in its nature, precedent, and not subsequent, and that, such being the case, until the condition was performed or the contingency upon which the power was conferred happened, the power could not be lawfully exercised. So that the real question in this case is whether the contingency upon which the power to sell was given had happened at the time the sale was made, and, as subsidiary to this, who was to determine whether the contingency had happened. To solve these questions, it will be necessary to inquire what was the nature of the condition. Was it the happening of a distinct and independent fact, or was it a condition which, in its very nature, involved the exercise of judgment or discretion for the determination of whether it had happened, and about which, therefore, there might well be, as ⁴⁸⁷ there was in this very case, honest difference of opinion? It certainly was not a distinct and independent fact, as if the testator had provided that the executor should sell when a certain person should attain to a certain age, but it was a condition, the happening of which could only be determined by an exercise of judgment. When the value of property should recover from a depression caused by war or any other

special circumstance must necessarily be a question to be determined by the exercise of judgment—one about which persons might, and probably would, honestly differ. What was to be the extent of the recovery which would authorize a sale? Somebody must judge of this, and, if the executor is not permitted to do so, then it is difficult to suggest who could. If the executor commits an error of judgment in determining such a question, that certainly ought not to invalidate a sale made by him in the honest exercise of his judgment. If it did, then it will be impossible to tell, until after it was tested by a judicial proceeding, whether any sale made under such a power was valid; and, if such a rule be established, it would destroy all chances of making such a sale, for certainly no one would buy with the prospect of having his title inquired into and assailed years after upon the ground that the executor had committed an error of judgment in determining a question which was left to his discretion. When, therefore, as in this case, a power of sale is given to an executor upon the happening ⁴⁸⁸ of a contingency which can only be ascertained by the exercise of judgment and discretion, and the executor, in the honest exercise of his judgment, determines that such contingency has happened, and accordingly makes the sale, such sale cannot be invalidated, even though it should be made to appear, in the light of subsequent events, that the executor had committed an error of judgment in determining whether the contingency had happened upon which he was authorized to sell. If, however, it should appear that the executor erred willfully, or from such gross negligence as would imply willfulness, then it would be different, and the question whether the sale should be allowed to stand would depend largely upon whether the purchaser had notice of such misconduct on the part of the executor”: *Jennings v. Teague*, 14 S. C. 238-240. Other authorities are in accord.

When the power of sale is conferred, to be exercised if a necessity for so doing arises, the judgment of the donee as to the necessity is conclusive, in the absence of fraud: *Bunner v. Storm*, 1 Sand. Ch. 357.

If the trustees exercise their discretionary power in good faith, and without fraud or collusion, the court cannot control or review this discretion: *Perry on Trusts*, sec. 511.

When a limited power of disposition is given, and the discretion of judging of the contingency is also conferred, and

there is no fraud or collusion, the sales ⁴⁸⁹ made by the donee cannot be impeached: *McGavock v. Pugsley*, 1 Tenn. Ch. 418.

Whatever liability might attach to the executor on its being made to appear that the exercise of his judgment was not made in good faith, the title of the purchaser would not be affected thereby, unless collusion or guilty knowledge can be traced to him: 2 Williams on Executors, 841.

The power of sale vested in Mrs. Matthews by the will of her husband is clearly a limited power, which she could exercise only upon the happening of the condition stated in the will—a necessity for so doing arising, a condition precedent—and she had no right to dispose of any of the property of the estate until this contingency was determined to exist. But by whom was the fulfillment of the condition to be determined? It did not depend upon the occurring of an independent or substantive fact, such as the majority or death of some particular person, of which there would be, in all probability, record evidence and which could be inquired into by a stranger or probable purchaser, and ascertained with as much certainty as it could by the donee of the power. It was a matter of which Mrs. Matthews—and here attention is called to the fact that this power is not given to her and John Matthews as executrix and executor, but to her alone, as an individual, as the widow of the donor and the head of his family, as well as one of the personal representatives ⁴⁹⁰ of his estate—was expected to and would know and understand better than anyone else.

The property was to be sold in case of necessity, and for the benefit of the family, which covered and included the individual wants and necessities of the widow and every one of the twelve children, as well as their collective interests in the proper management and protection of the estate of the testator. Who would have more accurate knowledge of all these matters than Mrs. Matthews? Who would be in a better position to determine the necessity of a sale of the property for the benefit of the entire family, and more interested in a correct determination of the question? And how was it possible for a stranger to ascertain the ever-changing and constantly increasing demands of this large family of children, almost yearly maturing, and requiring advancements to aid them in starting in life—a matter evidently contemplated by the testator? The occasion for the sale of the property might have been caused by a family necessity—one which it was not de-

sired to make public, imperatively demanding ready money, and just such a contingency as the testator desired to provide for above all things. There could have been a necessity—an imperative and absolute one—requiring the sale of the property, which the public did not know and could not ascertain. It is therefore clear that the condition upon which the power was to be exercised was not upon the occurrence of any certain event ⁴⁹¹ which could be ascertained by all persons alike, but the existence of a state of affairs the ascertainment of which called for accurate knowledge of the inside condition of the estate of the testator and that of the numerous members of his family, and the exercise of judgment and discretion in determining, upon this knowledge, whether the necessity did in fact exist as to which different persons might, in good faith, arrive at different conclusions.

We think it is evident that it was the intention of the testator which must control; that the existence of the necessity of a sale of his property should be determined by Mrs. Matthews, in whom he most confided, in accordance with her best judgment and discretion; and that any disposition of the property made by her in good faith, although others might differ with her as to the necessity, was valid, and vested in the purchaser a good title.

Powers of sale given in will should receive a liberal construction, in order to carry into effect the purpose and intent of the testator. To place any other construction upon this will than that which we have given it would clearly defeat the plain intent of the testator. It is clear that, by vesting this power of sale in his widow, he intended to provide not only a cheap and expeditious mode of sale of property for the purposes for which the law allows it to be sold, such as the payment of debts and for distribution among his children, but also for a prompt means of ⁴⁹² raising money whenever, in an emergency, the necessities of his family should require it. If the necessity of a sale was not to be determined by Mrs. Matthews, then it could only be ascertained by a resort to the courts, with attendant expense and delay, which it was intended to provide against. If the testator had intended that the power should only be exercised when a necessity should be judicially determined to exist, he would have so said, and such provision would also have been useless as a sale would have been decreed without any such power whenever a necessity recognized by law was found to exist; and, if Mrs. Matthews' determination

of the existence of the necessity for the sale was not conclusive, the power would be abortive and futile, for no one would purchase the property if any one of those interested, long afterward, as is here attempted, could have the matter opened, and her judgment as to the necessity of a sale reviewed and possibly held erroneous, and thus the construction contended for would defeat and destroy the power itself.

But if it were doubtful whether the exercise of the power conferred was left to the judgment and discretion of Mrs. Matthews, we would resolve the doubt in favor of such discretion, for the protection of the present owners of the property—they being innocent purchasers—since the complainants, who are in possession of all the facts, have not fully disclosed the extent of the estate of the testator, its indebtedness, ⁴⁹³ and the financial condition of the several members of the family when the sale was made.

In a late case similar to this, this court said: "The purchasers of the lot, as well as the present owners, appear to be innocent purchasers, and to have bought in good faith; and in their interest the rule will be enforced that where it is doubtful whether a power has been exercised legally or illegally, in favor of innocent purchasers and meritorious claimants, a legal execution will be presumed": *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294.

The other position of the complainants is equally unsound. While the conveyance made by Mrs. Matthews to Simeon Hynds purports upon its face to be made by her as an individual, and contains no reference to the will of Lawrence Matthews, nor to the power of sale contained therein, it does describe and convey in fee certain property of the testator, and contains full covenants of warranty. It is now well settled in this state that, when a conveyance is made of property which the conveyor is vested with a power to sell and convey, if the property [or power] be referred to in the conveyance, or the instrument would be inoperative except as an execution of the power, its exercise will be presumed, and no express recital of the power is required. In the case of *Hall v. Preble*, 68 Me. 100, quoted approvingly by this court, it is said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the ⁴⁹⁴ power. It is sufficient if the deed purports to convey the fee. When a person conveys land for a valuable consideration, he must be, and is, engaging with the grantee to make the deed as effec-

tual as he has the power to make it": *Young v. Insurance Co.*, 101 Tenn. 316, 47 S. W. 428.

It is sufficient if the intention to execute the power appears by words or deed indicating the intention: *Pate v. Pierce*, 4 Cold. 113.

If the deed purports to convey the fee, which would be impossible without the execution of the power, no recital of it is necessary, and the intention to exercise it is presumed: *Guarantee etc. Co. v. Jones*, 103 Tenn. 254, 255, 58 S. W. 219.

This deed does purport to convey the fee and warrant a perfect title, which the conveyer could not do or make good without the execution of the power and without which the deed would be ineffectual to pass the estate contracted; and we hold that the conveyer is presumed to have intended to and did, execute the power conferred upon her, and that the deed was and is operative to vest the fee to the property conveyed in her vendee, and the defendants claiming under him.

Affirmed, with costs.

A Power of Sale need not expressly appear upon the face of the instrument creating it: *Gulf etc. Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22, 30 South. 466. But the conditions attached to its execution must, it is said, be strictly complied with: *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588, 28 South. 799. A power of sale to be exercised on the happening of a particular event cannot lawfully be exercised until that event happens: *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499. Courts will not interfere with the exercise of discretionary powers by a trustee where he is acting in good faith; but they will where he is acting otherwise, or where he is declining the duty to exercise discretion: *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64, 16 South. 126.

WEBB v. FISHER.

[109 Tenn. 701, 72 S. W. 110.]

THE JUDGES of the Superior Courts of Record are Responsible Only to the people and the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. (p. 866.)

JUDGES, Civil Liability of.—An action cannot be maintained against a judge of general jurisdiction for his acts in decreeing the disbarment of an attorney, though it is alleged that in so doing he acted oppressively, maliciously, and corruptly. (p. 867.)

Webb & Cantrell, for Webb.

Wade & Robinson, for Fisher.

⁷⁰² McALISTER, J. The question presented upon this record is in respect of the liability of a judicial officer for certain official acts which are alleged to have been done oppressively, maliciously and corruptly. The more specific allegations of the declarations are that the defendant, T. J. Fisher, as chancellor of the fifth chancery division of Tennessee, decided against plaintiff the cause of W. H. Cummings, relator, against B. M. Webb, in the chancery court at Smithville, Tennessee, in which a decree of disbarment was made and entered ⁷⁰³ against plaintiff, a practicing attorney and counsel and solicitor in the courts of said state, and that said decree was pronounced corruptly, maliciously, wickedly and oppressively. There are other allegations in the declaration, which are not necessary to be mentioned since the statement already made presents the real case as made, stripped of useless verbiage and immaterial recitals. To this declaration defendant filed a plea of not guilty. At the July term, 1902, defendant asked leave of the court to withdraw his plea and file a demurrer to the declaration, assigning for cause the exemption of a judicial officer from such a suit; but this motion was disallowed. At the November term, 1902, the presiding judge, Honorable Joseph C. Higgins, being of opinion that the declaration stated no cause of action, dismissed the suit. Plaintiff appealed and has assigned errors.

The precise question with which we are now confronted has not heretofore been decided in this state, so far as we are advised by any reported opinion.

The case of Hoggatt v. Bigley, 6 Humph. 237, involved the liability of a justice of the peace for acts done in his official

capacity. Judge Green, in delivering the opinion of the court, said: "The only question is whether the justice of the peace had jurisdiction of the case against the slave, Jim, whom he ⁷⁰⁴ committed to prison; for it is not contended that a judicial officer is responsible for mere errors of judgment in a case of which he has jurisdiction, and in which, without malice, he honestly pronounces what he believes to be the judgment of the law. It was not contended in that case that the official act was done maliciously or corruptly, but the contrary appeared.

The case of *Cope v. Ramsey*, 2 Heisk. 197, was a bill filed by the next friend of a minor against the defendants as justices of Warren county, to hold them personally liable for a sum of money paid into the hands of the clerk of said court in Confederate money. The bill charged that all the parties defendant combined and confederated together to cheat and defraud said minor in this transaction; but the court found there was no proof to throw suspicion on the defendants. A demurrer was incorporated in the answer, which assigned that defendants were not responsible for acts done in a judicial capacity, and that the bill failed to charge that said acts were done with a corrupt, malicious or fraudulent purpose. Judge Sneed said: "If they [the justices], in the rendition of the order complained of, have done the complainants wrong by an honest error of judgment, they are not responsible for it, pecuniarily or otherwise. But," continues the court, "if they have acted corruptly, maliciously, and with purpose to defraud the complainant of his rights, then in an appropriate proceeding ⁷⁰⁵ they are responsible. The bill does not make out such a case. It does not impute to these justices any corrupt or dishonest motive touching this judicial act, and the bill is therefore demurrable."

It will be observed that the rule announced in the two cases last cited related to the official liability of justices of the peace, who are held exempt when the act is within the justices' jurisdiction, unless it is inspired by motives of malice and corruption.

But with respect to courts of superior and general jurisdiction a different rule has long obtained. It was thus announced in *Randall v. Brigham*, 7 Wall. 523, viz.: "Now, it is a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to

judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that, if this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly."

But in the case of *Bradley v. Fisher*, 13 Wall. 335, it was held that the qualifying words were incorrect, and that judges of courts of superior ⁷⁰⁶ or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. "A distinction," said the court, "must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much question for his determination as any other question involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend."

It was further stated in that case, viz.: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious ⁷⁰⁷ litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies, they must in such cases resort. But for malice or corruption, in their action, whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecutions in the form

of impeachment, or in such other form as may be specifically prescribed.

In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, or suspended or removed from office. In some states they may be thus suspended or removed without impeachment by a vote of the two houses of the legislature."

As said in *Scott v. Stanfield*, L. R. 3 Ex. 220: "This provision of the law is not made for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that ⁷⁰⁸ the judges should be at liberty to exercise their functions with independence and without fear of consequences": *Philbrook v. Newman*, 85 Fed. 139.

In the *American and English Encyclopedia of Law*, second edition, volume 17, page 728, it is said, viz.: "The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly"; citing numerous cases. The only cases cited as holding a contrary doctrine are several cases from Kentucky and two cases from Tennessee. The latter, as we have already seen, lay down the rule with respect to the liability of justices of the peace, namely, *Cope v. Ramsey*, 2 Heisk. 197; *Hoggatt v. Bigley*, 6 Humph. 237.

A reason for a different rule with respect to the liability of justices of the peace may be found in the fact that under our constitution they are not liable for crimes and misdemeanors in office, or removal from office for cause by a two-thirds vote of the general assembly. They are made liable to indictment and removal from office by the court upon conviction: Const. 1870, art. 5, sec. 5; Const. 1834, art. 5, sec. 5.

The rule exempting judges from liability for judicial acts is based upon the consideration that the judge represents the public. If, says Mr. Cooley, the duty which the official authority imposes upon an officer ⁷⁰⁹ is a duty to the public, a failure to perform it, or an inadequate or erroneous per-

formance, must be a public, and not an individual, injury, and must be redressed, if at all, in some form of public prosecution. The duty is public, and the end to be accomplished is public. The individual loss results from the proper or improper and imperfect performance of a duty, for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. But, as the duty neglected is not a duty to the individual, civil redress, as for a civil injury, is not admissible. This is only one reason for judicial exemption from individual suits: Cooley on Torts, 380, 381.

The necessary result of the liability would be to occupy the judge's mind and time with the defense of his own interests. The effect would be to lower the dignity of the court. Said Lord Tenterden, viz.: "In the imperfection of human nature it is better even that an individual should suffer a wrong than that the general courts of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who administer it." Quoted in *Williamson v. Lacy*, 86 Me. 80, 29 Atl. 943.

⁷¹⁰ These principles we believe to be sound, and apply in the present instance. The result is the judgment below is affirmed.

Judges of courts of superior or general jurisdiction cannot be called to account in a civil action for their judicial acts: Calhoun v. Little, 106 Ga. 336, 71 Am. St. Rep. 254, 32 S. E. 86; Yates v. Lansing, 9 Johns. 395, 6 Am. Dec. 290; Stewart v. Case, 53 Minn. 62, 39 Am. St. Rep. 575, 54 N. W. 938; and this has been held true, although they are alleged to have acted willfully, maliciously, or corruptly: Pratt v. Gardner, 2 Cush. 63, 48 Am. Dec. 652; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Cunningham v. Bucklin, 8 Cow. 178, 18 Am. Dec. 432. It is otherwise, however, in the case of a judge of limited or inferior jurisdiction: Robertson v. Parker, 99 Wis. 652, 67 Am. St. Rep. 889, 75 N. W. 423.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY v. PHILLIO.

[90 Tex. 18, 69 S. W. 994.]

RAILWAYS, Duty of to Protect Passengers from Assaults by Third Persons.—When one has entered a depot and produced a ticket for the purpose of becoming a passenger, it devolves on the railway company and its agent to protect such passenger from assault and insulting conduct on the part of third persons, if the agent knows of such misconduct or has reasonable ground to anticipate it. (p. 869.)

RAILWAYS, Duty of to Protect Persons Assisting Others to Become Passengers.—If one goes to a railway depot with his wife, to assist her in taking a train, but without any intention of himself becoming a passenger, the railway company does not owe him the duty of protecting him while at the depot from assault or insulting conduct on the part of third persons. (p. 870.)

A. P. McCormick and Frank Andrews, for the plaintiff in error.

E. T. Johnson, T. N. Graham, and N. J. Lewellyn, for the defendant in error.

¹⁹ **GAINES, C. J.** The following is the statement of this case together with their conclusions upon the evidence filed by the court of civil appeals:

²⁰ “This is an action by the appellee, Steve Phillio, against the railroad company to recover damages for injuries sustained, arising from the following state of facts, which are substantially alleged in his petition: Plaintiff and his wife went to the depot of the appellant’s road, in the town of Calvert,

for the purpose of procuring a ticket for his wife to the town of Marlin. She at the time was sick and in feeble condition. While waiting in the waiting-room of the depot for the train, and after the ticket had been purchased and the baggage checked, the defendant permitted one Allen, who was alleged to be a strong, active, and robust white man, and being in a drunken and rowdy condition, sang vulgar and indecent songs, and used vulgar and indecent language in the presence of plaintiff and his wife, and being armed with a pocketknife open in his hand, made an unjustifiable assault upon the plaintiff and his wife, by which the plaintiff and his wife were greatly intimidated, causing them to become frightened, and causing plaintiff's wife to become very nervous and sick. There are further allegations to the effect that the agent of the plaintiff at the depot at that time was present and witnessed the assault and wrongful conduct as alleged, inflicted upon the plaintiff and his wife by Allen, or was in a position to see the same, and that no steps were taken by the agent to prevent the assault or the wrongful conduct complained of. Upon trial of the case below, verdict and judgment were in favor of the plaintiff for the sum of four hundred dollars. We find that the evidence in the record substantially sustains these averments, and the judgment and verdict below are supported by the evidence found in the record."

The court of civil appeals found no error in the proceedings and affirmed the judgment of the trial court.

We are of the opinion that the conclusions of that court, in so far as they pertain to the rights of recovery by reason of the assault upon and insulting conduct toward the wife of the plaintiff are correct, but do not concur in the proposition that the evidence showed any right of action in the plaintiff on account of the outrage of Allen upon himself personally. The wife having entered the depot and a ticket having been procured for her, became a passenger of the defendant company, and the duty devolved upon the company's agent to protect her against assault and insulting conduct on the part of third persons, provided he knew of such misconduct or had reasonable grounds to anticipate it. As to the plaintiff the case is different. He went to the depot merely to assist his wife in taking the train and with no intention of becoming a passenger himself. He was there by the implied invitation of the company and was not a trespasser. The railway company owed him the duty which is owed by the owners of prop-

erty to persons who enter upon it by their invitation and no more. That duty is to use ordinary care to see that the premises are kept in a reasonably safe condition, so that persons entering thereupon by invitation are not injured thereby: *Hamilton v. Texas etc. Ry. Co.* 64 Tex. 251, 53 Am. Rep. 756; *Texas etc. Ry. Co. v. Best*, 66 Tex. 116, 18 S. W. 224. In the case ²¹ of *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31, the court say: "The defendant, in contracting to carry the passenger Naas in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger, it took upon itself the obligation of allowing him assistants to place him upon the train and seat him in the car, and the compensation received by the defendant for conveying Naas from Mount Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself." So far as we have been able to discover, this case, in so far as it holds that the railway company owed the same duty to the assistants which it owed to the passenger stands by itself; and unless there be a distinguished feature in the fact that owing to the enfeebled condition of the passenger, which made it necessary for his friends to assist in boarding the train and securing a seat (which we doubt), it is in opposition to all the authorities upon the question.

Our conclusion is that since the plaintiff was not a passenger the defendant company did not owe him the duty of protection against the injurious actions of third persons, and that therefore he was not entitled to recover for the misconduct of Allen toward himself. Therefore the judgment of the district court and that of the court of civil appeals are reversed and the cause remanded.

It is the Duty of a Carrier to protect its passengers from injury, violence, insult, and ill-treatment at the hands of strangers, fellow-passengers, and employes, and for a failure to perform this duty it is answerable: *Birmingham Ry. etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456; *United Ry. etc. Co. v. Deane*, 93 Md. 619, 86 Am. St. 453, 49 Atl. 923; *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298, 52 N. E. 747; monographic notes to *Kommel v. Schambacher*, 6 Am. St. Rep. 734-737; *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 90-101; *Goodloe v. Memphis etc.*

R. R. Co., 54 Am. St. Rep. 80. See, also, Brunswick etc. R. R. Co. v. Ponder, 117 Ga. 63, ante, p. 152, 43 S. E. 430; Central of Georgia R. R. Co. v. Motes, 117 Ga. 923, ante, p. 223, 43 S. E. 990.

Persons Assisting Passengers or accompanying them are not ordinarily considered passengers within the meaning of the law imposing extraordinary liability on common carriers for the safety of those whom they undertake to carry: See Earl v. Chicago etc. Ry. Co., 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381; monographic notes to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 97; Little Rock etc. Ry. Co. v. Lawton, 29 Am. St. Rep. 54-56.

CAUBLE v. WORSHAM.

[96 Tex. 86, 70 S. W. 737.]

PAROL GIFT OF REAL PROPERTY—Specific Performance of.—One who, upon the faith of a gift from the owner, enters into the possession of real property and makes improvements of a valuable and permanent character, becomes entitled to specific performance by the owner. (p. 874.)

A MARRIED WOMAN Entering with Her Husband upon the Possession of Real Property under a Parol Gift and making valuable and permanent improvements acquires an equitable title thereto in her separate right. (p. 874.)

PAROL GIFT OF REAL PROPERTY—Title of the Donee.—One who enters upon real property by virtue of a parol gift thereof and does such acts as entitle him to specific performance, acquires an estate of freehold and inheritance, and may maintain trespass to try title either against the vendor or other persons. (p. 874.)

MARRIED WOMAN—Conveyance of Her Equitable Title.—If a married woman under a parol gift from an owner has the right to a conveyance of real property, her title cannot be divested by a conveyance made by such owner to a third person at her request. She can convey her equitable estate in the same manner only as that in which she can convey her legal estate, namely, by a conveyance executed by herself and husband, acknowledged in the manner prescribed by statute. (p. 875.)

CONVEYANCE—Quitclaim Deed—Parol Evidence to Vary Effect of.—Evidence is not admissible to show that a quitclaim deed did not pass all the title vested in the grantor at the time of its execution. (p. 875.)

MARRIED WOMAN—Estoppel to Assert Title.—A married woman who is entitled to a conveyance of her real property by the owner of the legal title and procures him to convey it to another is not estopped from afterward asserting that such conveyance is void as against her rights. (p. 876.)

CONVEYANCE—Evidence Insufficient to Establish.—Testimony that a witness contracted for and bought from another person a "lifetime interest," and that he does not remember the wording of the deed, is too uncertain to establish a conveyance of any particular character, and does not warrant the submission of the case to the jury on the assumption that any party might have acquired rights through the conveyance. (p. 876.)

COTENANTS—Statute of Limitations—Effect of a Suit by Some of the Cotenants.—A suit by one cotenant does not stop the running of the statute of limitations against another in favor of whom no right is asserted by such suit. (p. 877.)

Ivy & Scruggs and A. P. McKinnon, for the plaintiffs in error.

R. M. Vaughan and F. P. Works, for the defendants in error.

60 WILLIAMS, A. J. Defendants in error brought this suit to recover of plaintiff in error one hundred and fifty-three acres of land in two tracts, one of one hundred acres and the other of fifty-three acres; and in the district court judgment was rendered for plaintiff, Mrs. Worsham, for an undivided half of the one hundred acres, and for defendant, Cauble, for the fifty-three acres. The appeal of Cauble to the court of civil appeals involved only the title to the one hundred acres, and the judgment of that court, affirming that of the district court, is brought in review by this writ of error. The titles of both parties proceed from D. B. Cauble, who, prior to 1876, was the owner of the land in controversy. In that year he made a verbal gift of the one hundred acre tract to his daughter, Mrs. S. E. Kirkpatrick, who with her husband took possession of and made valuable improvements upon it and occupied it as their homestead for about two years. In 1878 they sold the land to F. D. De Chaumes, and, as D. B. Cauble had made no deed to Mrs. Kirkpatrick, it was orally agreed between all the parties that he should convey it directly to De Chaumes, which he did August 9, 1878. This deed was not recorded until March 18, 1895. Kirkpatrick and wife received the consideration and surrendered possession to De Chaumes and moved to another county, where they remained until 1884, when they returned to the neighborhood of the land. In the meantime F. D. De Chaumes had died and his widow had married one Williams, who was living with her upon the one hundred acre tract. Kirkpatrick and wife bought from Mrs. Williams an interest and obtained a deed, the character of both of which is very indefinitely stated in the oral testimony in the record, the deed not having been produced. Concerning this transaction Mrs. Kirkpatrick testified: "We bought the land from the old lady and got a lifetime dowry. . . . Mrs. De Chaumes had married again, and was Mrs. Williams then. I don't know whether she had made me a

deed, what you call a deed; she made me a lifetime ⁹¹ dowry; she made the deed, or whatever you might call it, to me and Mr. Kirkpatrick. We turned it and all the papers over to Mr. Surginer when we sold the place. . . . We sold it to him [Surginer] after we bought it back from the old lady De Chaumes. . . . Mrs. De Chaumes had married Williams when I returned to buy the place from her; she had been married but a short time and her children were living with her. I contracted to buy from her the lifetime interest; she is dead; she died four or five years after I bought her lifetime interest. We moved off the place and Surginer took possession of it. When I bought the place from Mrs. Williams I moved on it and moved off again inside of a year. The instrument that I got from Mrs. Williams was acknowledged before Calloway, I did not file it for record. Nobody joined in the deed besides Mrs. Williams; none of the children by either marriage joined in it. . . . When I bought the land back from Mrs. Williams, I bought the entire one hundred and fifty-four acres; I gave her five or six hundred dollars for the land when I bought it back. . . . I bought a lifetime interest from Mrs. De Chaumes; I don't remember the words of the deed. I don't remember what the wording of the deed was." After this transaction Mrs. De Chaumes left the place and Kirkpatrick and wife, claiming under it alone, took and retained possession for less than a year, when Columbus Surginer bought the land, taking a warranty deed from D. B. Cauble, March 14, 1885, and a quitclaim deed from Kirkpatrick and wife April 1, 1885. Surginer paid the value of the land, and the testimony of Mrs. Kirkpatrick is that she received this consideration. Surginer took possession and afterward conveyed part of the land to M. Wilhoit, April 7, 1887, and the other part to plaintiff in error, J. L. Cauble, August 19, 1887. Wilhoit conveyed his interest to J. L. Cauble, October 22, 1887. Surginer, Wilhoit and Cauble have kept up continuous possession under their deeds, which were duly registered, and have paid the taxes on the land. Mrs. Williams died in 1891 or 1892 and this suit was begun December 19, 1889. The plaintiffs assert the title of the ten children of De Chaumes, some of whom were the children of the widow who survived him and others the fruit of a former marriage. Five of them were held by the district court to be barred by limitation, but the other five, having been under disability, were held not to be barred, and, as Mrs. Worsham held their

interest by assignment, she recovered the half interest adjudged to her.

The defendant, Cauble, under his chain of title, claimed that Surginer, Wilhoit, and himself were all innocent purchasers for value without notice of the unrecorded deed from D. B. Cauble to De Chaumes, but upon evidence tending to show notice to each of them, the jury found against them on this issue and this finding is not attacked.

Cauble also claimed that, under the gift from D. B. Cauble to Mrs. Kirkpatrick, accompanied by possession and improvement, such title vested in her, as her separate property and homestead, as could not be conveyed by the donor, nor by the donee, except by the joint deed of herself and husband properly acknowledged, and that this title vested in ⁸² him through the subsequent deed of Kirkpatrick and wife to Surginer, and entitled him to recover, without regard to other issues, and he requested a charge embodying this contention which the court refused to give. The court of civil appeals held that Mrs. Kirkpatrick was estopped by the transaction between herself and her father and De Chaumes, and that defendant could not assert her right under the gift; and it was upon assignments calling in question these rulings that this writ of error was granted.

The evidence was sufficient to justify a finding that, upon faith of the gift from her father, Mrs. Kirkpatrick and her husband entered into possession and made improvements of such valuable and permanent character as entitled her to a specific performance at the hands of her father. Everything essential to take the oral gift out of the statute of frauds and to authorize the enforcement of it in equity having transpired, the equitable title to the property was thereby vested in the donee in her separate right. This proposition has long been settled by the decisions of this court: *Hendricks v. Snediker*, 30 Tex. 296; *Murphy v. Stell*, 43 Tex. 123; *Wells v. Davis*, 77 Tex. 636, 14 S. W. 237. Parol gifts thus executed are unquestionably placed by our decisions upon the same footing as parol sales of land, and where there has been such performance by possession and improvement as to meet the requirements of the decisions, the right which vests in a donee is of the same character as that which vests in a vendee, viz., the equitable title. Of such a right acquired by a vendee it was said in *Harold v. Sumner*, 78 Tex. 583, 14 S. W. 995: "Under this state of facts we think it quite clear that H. Chowning acquired

a good title to the lots from T. Chowning." Several of the decisions recognize the right of the holder of such a title to recover or defend upon it in the action of trespass to try title either against the vendor or other persons. The estate which is thus created is, in equity, one both of freehold and inheritance. It is provided by article 624 of the Revised Statutes: "No estate of inheritance or freehold" shall be conveyed unless by writing; and by article 635, that "the husband and wife shall join in the conveyance of real estate, the separate property of the wife," and that the deed shall be separately acknowledged by the wife. From this it seems evident that Mrs. Kirkpatrick acquired an estate in the land which could not be conveyed by D. B. Cauble, and which could only be legally conveyed by herself and her husband. It is urged that because her right was not a legal but only an equitable one, she could legally authorize the conveyance of it by her father by deed passing his legal title. But no such distinction between conveyances of legal and equitable estates is admissible under our statutes: *Masterson v. Little*, 75 Tex. 697, 13 S. W. 154; *Sprague v. Haines*, 68 Tex. 217, 4 S. W. 371. Since her father could not by his mere deed pass her title, a conveyance by her was necessary; and that conveyance could not consist of her parol agreement either that she would or that her father might convey, for the reason that the statute requires a particular kind of conveyance to divest her separate estate. Nor is it true that the defendant could not assert that the transaction⁹⁸ was inoperative upon the title. His position is that, since this title did not pass to De Chaumes but remained in Mrs. Kirkpatrick, Surginer regularly acquired it from her and defendant acquired it from Surginer. He is not a stranger to the equity asserted against the legal title, but connects himself with it by the deed from the original holder of it: *Masterson v. Little*, 75 Tex. 697, 13 S. W. 154; *Harold v. Sumner*, 78 Tex. 582, 14 S. W. 995; *Murphy v. Stell*, 43 Tex. 123; *Secrest v. Jones*, 21 Tex. 132. An attempt was made in the argument to show that the quitclaim deed of the Kirkpatricks to Surginer was intended to convey only such interest as the grantors had acquired through their trade with Mrs. De Chaumes under which they re-entered. But the record only states the quitclaim deed as covering the one hundred acres, which we understand to mean that the grantors conveyed such interest as they had in the tract. The deed therefore operated upon any title of which they were possessed. Evidence was admis-

sible to show any title which was vested in the grantors at the date of their deed, and the effect of the deed upon such title could not be limited by parol evidence: *Ragsdale v. Mays*, 65 Tex. 257.

The facts stated do not show an estoppel against Mrs. Kirkpatrick. The elements essential to the estoppel of a married woman have been so often discussed and stated in the decisions of this court as to render elaboration unnecessary. The evidence shows no misrepresentation, concealment or deception of any character on the part of the feme covert; nor does it tend to show that De Chaumes was ignorant of the true state of the facts and the character of her right. It exhibits only a mistaken attempt to obtain the title of a married woman by an ineffectual method. To hold that she is estopped by her bare parol agreement to pass away her title, even for a consideration received, would be to authorize a mode of conveyance forbidden by the statute by the mere substitution of terms: *Berry v. Donley*, 26 Tex. 738; *Fitzgerald v. Turner*, 43 Tex. 79; *McLaren v. Jones*, 89 Tex. 131, 33 S. W. 849; *Steed v. Petty*, 65 Tex. 490.

Plaintiff in error requested a charge explaining to the jury the essentials of a valid conveyance by Mrs. Williams and her husband and the effect upon questions of limitation of a finding that a sufficient conveyance had not been made by them to pass any interest. We are of the opinion that the evidence which we have recited is too uncertain to establish a conveyance of any particular character, and no question should have been submitted to the jury upon the assumption that either party might have acquired rights through a conveyance. Neither side produced a deed, nor gave any reason why it was not done; and neither had the right to have the jury to indulge in mere conjecture as to the true nature of the transaction. The assignment upon the refusal of the special charge only indirectly raises a question of some merit. Such title as De Chaumes obtained from Cauble was community property of himself and the wife who survived him. This suit was instituted by his children before the death of the survivor. When they sued they only had title to the interest inherited from their father, or such portions of it as defendants had not acquired by limitation. Had limitation then been ⁹⁴ running against Mrs. Williams it would not have been stopped by the suit of her cotenants asserting no right in her: *Stovall v. Carmichael*, 52 Tex. 383. Limitation was not running against her because of

her coverture, but she died pending suit, and her interest descended to her children, who were parties therein. Their disabilities could not be tacked to hers, but limitation, unless prevented by the pendency of the action, commenced to run against this interest upon her death. The record has probably not been made up with reference to this question, and it has not been argued. As we have concluded to remand the case for a new trial, we merely suggest it to avoid misapprehension, without undertaking to definitely determine the rights depending on it.

Reversed and remanded.

A Parol Agreement to Convey land will, under some circumstances, support a suit for specific performance: Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960; Lothrop v. Marble, 12 S. Dak. 511, 76 Am. St. Rep. 626, 81 N. W. 885; Svanburg v. Fosseen, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4; Emmel v. Hayes, 102 Mo. 186, 22 Am. St. Rep. 769, 14 S. W. 209. But the agreement must be definite and certain: Croedale v. Lanigan, 129 N. Y. 604, 25 Am. St. Rep. 551, 29 N. E. 824.

The Joinder of Husband and Wife in the conveyance of her separate estate is discussed in the note to Peters v. Byrns, ante, pp. 584-592. It is held in Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897, that a wife may convey her separate equitable estate without her husband joining in the conveyance.

Estoppel Against Married Women is discussed in the monographic note to Trimble v. State, 57 Am. St. Rep. 169-185.

HOUSTON EAST AND WEST TEXAS RAILWAY COMPANY v. DE WALT.

[96 Tex. 121, 70 S. W. 531.]

MASTER AND SERVANT—Duty of Obedience.—It is not true that employes of a railway corporation are bound under all circumstances to obey the orders of their superiors. Obedience to an order may involve personal risk so great and obvious that no prudent man should take it. A master or his representative has no right to give, nor is the servant bound to obey, such an order. (p. 882.)

A MASTER ORDERING HIS SERVANT to do Extrahazardous Work is not necessarily answerable to the servant for injuries received from his obedience. If the work involves risk so great and obvious that no prudent man should undertake it, a servant who takes the risk of doing it will not be heard to complain in the courts. (p. 882.)

JURY TRIAL—Error in One Instruction, When not Cured by Others.—An instruction that a servant of a railway must obey the

orders of his superior, and if the work required is extrahazardous, the company is responsible for the master's orders being obeyed, is erroneous, and the error is not cured nor rendered harmless by other instructions correctly defining negligence and contributory negligence and informing the jury that the plaintiff cannot recover if guilty of contributory negligence. (p. 883.)

JURY TRIAL.—Where Instructions are in Such Conflict as to Confuse the Jury, the judgment should be reversed. (p. 883.)

PLEADING INCONSISTENT DEFENSES.—The defendant has the right to plead inconsistent defenses. If in one part of his answer he denies a fact and in another part alleges its existence, the answer cannot be taken as an admission of such fact. (p. 883.)

Action to recover damages for personal injuries suffered by the plaintiff while in the service of the defendant railway corporation. Among his duties were those of sealing and cleating cars. He was ordered by the defendant's agent to seal a car then on the main track, and he sealed the car and got on the end of it to cleat a window, but, before completing this task, the train crew, without warning, ran an engine and came down on the main line, striking the car on which the plaintiff was at work, and causing him to fall and receive injuries. The putting of an unsealed car in the train was against the rules. The agent's testimony was to the effect that when he told the plaintiff to seal the car it was on a sidetrack. Whether the car was on the main or side track when the direction was given to the plaintiff, whether he was expected to work with it while on the main track, and if so, whether his so doing was not so extrahazardous that he should have declined to obey the orders, were subjects of contention between the parties.

The judge, in his instructions to the jury, defined negligence, contributory negligence, and ordinary care, and further instructed the jury as follows:

"You are charged that if J. E. Burton, the defendant's station agent at Livingston, ordered the plaintiff to go and seal and cleat (or do either) the car while on the sidetrack near the depot at Livingston, and the plaintiff, in obedience to Burton's order, went upon the sidetrack and performed a part of the work ordered to be done, but had not finished the work when the car was moved upon the main line, and after the said car was moved on to the main line the plaintiff resumed his work on said car and was engaged in said work when the engine and car or cars attached to it were backed up against the car on which the plaintiff was engaged in his work, and the plaintiff was thereby knocked against the cars and thrown to the ground and injured as alleged by him, and further you find from

the evidence that the defendant's servants or employes operating the engine and portion of train attached to it were guilty of negligence in so backing up the train against the car on which the plaintiff was at work and the plaintiff himself was not guilty of contributory negligence, then the plaintiff would be entitled to recover.

"If the servants or employes, or either of them, of defendant company operating the train expected or had reason to believe that the plaintiff was between the cars at the time they were about to back the train, then it was their duty in some manner to give the plaintiff timely warning that the cars were being backed, in order that he might get away or by some means protect himself against danger; and the failure to give such warning under the circumstances mentioned would constitute negligence which would render the defendant company liable unless plaintiff himself was guilty of contributory negligence in being where he was at the time of the accident.

"If you find from the evidence that J. E. Burton did not order the plaintiff to seal and cleat, or do either, the car while on the main track, and the plaintiff went upon the car when on the main line to complete his work begun on the sidetrack, and further you find that a person of ordinary care and prudence would not have gone between the cars (or at the place where plaintiff took his position) to finish his work on the car at the time he did and under the circumstances of the situation, then the plaintiff can not recover, and if you so find you will return a verdict for the defendant company.

"You are instructed that if the conductor or other trainmen operating the train had knowledge of the fact that De Walt had undertaken the work of sealing and cleating the car while on the siding, the question then is: Did the conductor or other trainmen who had such knowledge act as persons of ordinary care and prudence in assuming that De Walt had completed his work and gone, or should they, in the exercise of ordinary care, have taken the pains to ascertain with certainty whether he continued the work on the main track, before they moved and backed the train? If, having such knowledge, they did not act as men of ordinary care and prudence would have done under the circumstances as indicated when they backed up the train against the car on which plaintiff was at the time of the accident, then they were guilty of negligence.

"If under such circumstances the conductor and other trainmen acted as men of ordinary prudence would have done, then

upon this phase of the case they would not be guilty of negligence.

"If you find that the defendant company's employes were guilty of negligence as charged, and you also find that the plaintiff was guilty of contributory negligence, then you will return a verdict for the defendant company.

"If you find for the plaintiff, then you will return a verdict for such amount of damages as will fairly and justly compensate him for the injuries sustained by reason of the accident, and you will take into the estimate the physical and mental pain and suffering, if any, occasioned thereby; the reasonable medical or surgical expenses, if any, incurred thereby; and the plaintiff's diminished capacity, if any, to labor and earn money in the future, considering the probable duration of his life.

"If you do not find for the plaintiff then let your verdict be for the defendant, the Houston East and West Texas Railway Company.

"You are charged that the burden of proof is upon the plaintiff to establish the negligence of which he complains by a preponderance of the evidence—that is, by the greater weight of credible evidence; and when the preponderance of evidence establishes the negligence as charged against the defendant, then the burden of proof is upon the defendant to establish contributory negligence on the part of the plaintiff.

"And in determining the question of negligence and contributory negligence and ordinary care, you will look to all the testimony before you and draw your conclusions from all the evidence before you—you being the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to the testimony. The law of the case you receive from the court and must be governed thereby."

The court also, on behalf of the plaintiff, gave special charge No. 8, "that a servant of a railway company must obey the orders of his superiors and those over him, as that is his primary duty, and if the work required is extrahazardous the company is responsible for the master's orders being obeyed."

Special charges numbers 4 and 8 were given on behalf of the defendant as follows: "Every person owes it to himself to use ordinary care and caution in guarding against danger and protecting himself from injury. Ordinary care and caution, as herein used, is such as a prudent man would exercise under similar circumstances.

"Now, if you believe from the evidence before you that the plaintiff Cole De Walt, in being between the cars or there remaining as he did at the time and under the circumstances surrounding him when he was hurt, did not use ordinary care and caution (as such care and caution is herein defined), and that his going between the cars or remaining there contributed to the injury he received and of which he herein complains, and if you believe that the defendant's agents and servants in charge of the train from which plaintiff fell were not apprised of the dangerous position of De Walt in time to save him from the injury, the plaintiff cannot recover in this case. And if you so believe, let your verdict be for the defendant company."

"The defendant requests the court to instruct the jury as follows:

"If you believe under the evidence in this case that the employes of the defendant operating its train at the time plaintiff was hurt did not know that the plaintiff was on the car he was, and under all the circumstances of this case had no reason to believe that he was on the car, then the plaintiff is not entitled to recover and your verdict should be for the defendant, no matter what you may find the other facts to be."

"Give with this addition: After the word 'car' in third line from the bottom insert the words, as follows: 'And provided that the conductor or other trainmen (if they had the knowledge of the fact that the plaintiff had commenced work on the car while on the siding) acted as men of ordinary care and prudence would have done under the circumstances in assuming that the plaintiff had finished his work and gone.'"

There was a conflict of evidence respecting whether the plaintiff's duties included the cleating of the windows as well as the sealing of the doors of the cars. On this issue the plaintiff, against the objection of the defendant, was permitted to offer in evidence an abandoned pleading of the defendant, in which it was alleged to be the duty of the plaintiff to cleat or fasten the windows. The court of appeals certified three questions for the supreme court:

1. Was the charge to the jury under the pleadings and evidence?

2. If erroneous, were these defects cured by any portion of the charge given the jury, or is it such affirmative error as requires a reversal of the judgment?

3. Was the abandoned pleading admissible in evidence against the defendant as an admission that the plaintiff was

acting in the performance of his duty in cleating the windows of the car?

Baker, Botts, Baker & Lovett and J. S. McEachin, for the appellant.

Hill & Hill and Oscar F. Oates, for the appellee.

¹³³ WILLIAMS, A. J. 1. It is not true that servants of railway companies are held bound by the law under all circumstances to obey the orders of their superiors. Obedience to an order may involve personal risk so great and so obvious that no prudent man should take it. The master or his representative has no right to give nor is the servant bound to obey such an order. Nor is it necessarily true that, if work which the master orders the servant to do is extrahazardous, the master is responsible to the servant for the consequence of obedience. If the work be of so dangerous a character as we have just instanced, the servant, if he takes the risk of doing it, will not be heard to complain in the courts. The statement of the rule in the special charge was in an abstract and comprehensive form, without a qualification which was essential to its accuracy. A jury following it according to its terms would be bound to conclude that, if the servant were injured as a consequence of his obedience of an order of his superior, the master would be responsible, in law, for the damage inflicted, whatever might be the character and degree of the danger incurred. The defense involved the contention that the order to seal up the car only meant that the plaintiff should do so while the car was on the sidetrack, and that, in following it upon the main track and there exposing himself to increased perils, plaintiff went beyond the terms of the order. If this is true, and plaintiff was not hurt while acting in obedience to the agent's order, the special instruction had no application. But the plaintiff's theory, reflected in the instruction, evidently was that the order required the work upon the car, whether at one place or the other, and was being executed when the injury occurred. This was a question for the jury, and, in case they sustained this contention of plaintiff, the further question arose for their decision, whether or not the situation involved such risk that plaintiff as a man of ordinary prudence ought not, under all the circumstances, including the order, to have undertaken to do the work as he did. The general charge and special ¹³⁴ charges given for defendant submitted this question as

one of negligence vel non, but special charge No. 8, applied in this connection, virtually instructed without qualification, that, if the work was extrahazardous and plaintiff in doing it was obeying the order, defendant would be responsible. This was, in effect, to tell the jury that the order, if obedience to it brought about the injury, removed any question as to plaintiff's negligence as submitted in other instructions. At least the jury might naturally thus reconcile the differing instructions, and such instructions, if not thus reconciled, would be in such conflict as to confuse the jury. In either view there was error which the appellate courts cannot say was harmless.

We answer the first question and the first branch of the second question in the negative. Assuming that the question of reversal or not depends alone upon the instructions, the pleadings and evidence stated, we answer the second branch of the second question in the affirmative.

2. A defendant has the right to plead inconsistent defenses, and where in one part of an answer he denies or otherwise puts in issue a fact and in another part alleges its existence, the answer cannot be taken to be an admission of such fact: *Duncan v. Magette*, 25 Tex. 246. Many other rulings of this court affirming this proposition might be cited. But this is true, not because admissions in pleading are not admissible against the party making them, but because a plea, in one part denying a fact and in another part affirming it, cannot, under our statute, be treated as an admission of the fact. Abandoned pleadings when offered in evidence should doubtless be constructed in the same way, and not be admitted as conceding a fact both affirmed and denied. But this rule has nothing to do with the admissibility of pleadings in evidence as tending to show a fact which they distinctly allege. If a fact be admitted in the pleadings on which the case is tried, it is, in general, assumed without other evidence to be conclusively established for the purposes of the trial: *Ogden v. Bosse*, 86 Tex. 344, 24 S. W. 798. The same rule cannot be applied to pleadings superseded by amendment, but it does not follow that distinct admissions in them of particular facts cannot be used as evidence against the party who filed them. The admission of a party thus made is admissible against him under the rule of evidence which allows admissions against interest. Of course they are open to explanation or contradiction like other admissions. It is sometimes the fact that allegations are made by

the attorney drawing pleadings upon a misunderstanding of the facts and not by authority of the party, and this, of course, may be shown. All that appears here as to this is that the superseded answer contained the allegation offered in evidence, and we think that pleadings which have been filed in court in behalf of a party should be, *prima facie* at least, regarded as authorized by him and admissible against him, where they admit facts relevant to the issue. This court has recently had occasion to review this subject and to point out that the question under consideration was not decided ¹³⁵ in *Coats v. Elliott*, 23 Tex. 606, the expressions in which have given rise to most of the difference of opinion that has arisen in this state: *Watson v. First Nat. Bank*, 95 Tex. 351, 67 S. W. 314. The case of *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, is one in which the question was fully considered in the majority and dissenting opinions of the court of civil appeals of the second district, and in which this court held with the majority affirming the admissibility of the evidence. The plea in that case was signed and sworn to by the party himself, and this made it certain that the admission was his own and perhaps added to its weight as evidence, but its admissibility did not depend on those circumstances. The certificate shows only that the fact in question was alleged in the plea offered in evidence, by which we understand that such fact was admitted and not otherwise put in issue. Such being the case the plea was admissible.

RIGHT OF RECOVERY BY EMPLOYÉES ACCEPTING EXTRA- HAZARDOUS DUTIES.

- I. General Rights and Duties of Master.**
 - a. Right to Engage in Dangerous Business.
 - b. Duty to Provide for Safety of Servant.
- II. Assumption of Risk and Contributory Negligence.**
 - a. General Scope of the Doctrines.
 - b. Criticism—Unequal Footing of the Parties.
 - c. Servant's Fear of Dismissal.
 - d. Appreciation of the Danger.
 - e. Judgment of the Parties as to the Danger.
 - f. Immediate Direction of Master.
 - g. Method of Doing Work.
- III. Obeying Express Orders and Directions.**
 - a. In General.
 - b. Sudden Commands—Emergency.
 - c. Positive and Peremptory Commands—Coercion.
 - d. Assurance of Safety by Master.
 - e. Work Beyond Scope of Employment.

I. General Rights and Duties of Master.

a. Right to Conduct Dangerous Business.—The common law confers upon employers the right to decide how their work shall be performed, and to employ men to work in an unsafe place or with dangerous implements, without incurring liability for injuries sustained by the workmen who knew, or should have known, the hazards of the service they have chosen to enter: *McGorty v. Southern etc. Tel. Co.*, 69 Conn. 635, 61 Am. St. Rep. 62, 38 Atl. 359; *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612. If an employé enters upon the service, knowing the risks involved, he is regarded as having voluntarily incurred them, unless the employer urges or coerces him into danger, or in some way directly contributes to the injury: See the monographic note to *Bazzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222.

In recent years, however, it has dawned upon society that the employer is not the sole party interested in the manner in which he carries on his business, but that the employé and the public have a right to be heard. One of the practical results of this awakening has been the enactment of statutes prescribing measures of safety which an employer must take for the safety of his employés. But this is an aspect of the question which it is not our purpose here to discuss. It is adverted to merely to suggest that the almost absolute right of an employer to carry on his business by means of unnecessarily dangerous means, provided his servants contract with a full knowledge and appreciation of the danger, no longer exists; and that a substantial beginning has been made toward affording, by law, a protection to employés which their dependent position places beyond their own power to demand.

b. Duty to Provide for Safety of Servant.—A master owes to his servant the duty of providing a reasonably safe place in which to work, of furnishing reasonably safe tools, appliances, and machinery, and of exercising reasonable diligence to employ reasonably safe and competent men to perform their respective duties. And the servant has a right to assume that this duty has been discharged: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591-600; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Chicago etc. R. R. Co. v. Champion*, 9 Ind. App. 510, 53 Am. St. Rep. 357, 36 N. E. 221, 37 N. E. 21; *Thompson v. Bartlett etc. Co.*, 71 N. H. 174, 93 Am. St. Rep. 504, 51 Atl. 633; *Nord Deutcher Lloyd Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619; *Kehler v. Schwenk*, 151 Pa. St. 505, 31 Am. St. Rep. 777, 25 Atl. 130; *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 419; *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 Am. St.

Rep. 798, 68 Pac. 414; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847, 68 Pac. 896; *Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. Rep. 321. The master's duty in these respects is continuous. Discharging it in the first instance is not sufficient to exonerate him; he must see to it that the means and instrumentalities for carrying on operations are kept and maintained in a reasonably safe condition: See the monographic note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 220; *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 South. 268; *Dyas v. Southern Pac. Co. (Cal.)*, 73 Pac. 972; *Shebek v. National Cracker Co. (Iowa)*, 94 N. W. 930; *Covington Sawmill Mfg. Co. v. Clark*, 25 Ky. Law Rep. 694, 76 S. W. 348; *Myers v. Hodson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Elmore v. Seaboard Air Line Ry. Co.*, 132 N. C. 865, 44 S. E. 620; *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 420, 71 Pac. 988. But he is not bound to make the place of work, the machinery, the tools, and the appliances as safe as they can be made; he is not bound to furnish the newest and safest tools, machinery, and appliances. Ordinary care—the care and diligence exercised by ordinarily prudent men engaged in similar enterprises—is the measure of his duty, having regard to the dangerous character of the work, and the advanced state of invention and improvements. He is not an insurer or guarantor of safety: See the monographic note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 221, 222; *Disano v. New England Steam Brick Co.*, 20 R. I. 452, 40 Atl. 7; *Oliver v. Ohio River R. R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Innes v. Milwaukee*, 96 Wis. 170, 70 N. W. 1064. But when an employment is in its nature perilous, he must adopt precautions and safeguards against such perils: *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 975. And when safer appliances have been invented, tested, and come into general use, it is negligence per se for an employer to expose his servants to the hazard of life and limb from antiquated and defective appliances that generally have been discarded by the intelligence and humanity of other employers: *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 70 Am. St. Rep. 580, 32 S. E. 550. See, also, *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981.

II. Assumption of Risks and Contributory Negligence.

a. **General Scope of the Doctrines.**—If a master has discharged the foregoing duties which the law imposes upon him, then a servant voluntarily engaging in a dangerous or extrahazardous employment assumes the ordinary risks incident thereto which are known or obvious to him. And this doctrine applies as well to those risks which first arise or become known to the servant during the service as to those in contemplation at the original hiring. Moreover, it applies alike to all risks, whether they arise from the negligence of fellow-servants, insufficiency of workmen, method of work, defective tools, appliances, and machinery, or dangerous premises: *Coal Run*

Coal Co. v. Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Swift & Co. v. Rutkowski, 167 Ill. 156, 47 N. E. 362; Armour v. Brazeau, 191 Ill. 117, 60 N. E. 904; Indianapolis etc. Ry. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; Meador v. Lake Shore etc. Ry. Co., 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665; Joyce v. Worcester, 140 Mass. 245, 4 N. E. 565; Carr v. St. Clair Tunnel Co. (Mich.), 92 N. W. 110; Claybaugh v. Kansas City etc. Ry. Co., 56 Mo. App. 630; Thompson v. Missouri Pac. Ry. Co., 51 Neb. 527, 71 N. W. 61; Chandler v. Atlantic etc. Ry. Co., 61 N. J. L. 380, 39 Atl. 674; Johnson v. Devoe Snuff Co., 62 N. J. L. 417, 41 Atl. 936; Porter v. Western etc. R. R. Co., 97 N. C. 66, 2 Am. St. Rep. 272, 2 S. E. 581; Nuss v. Rafsnyder, 178 Pa. St. 397, 35 Atl. 958; Brown v. Chattanooga Electric Ry. Co., 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; Gann v. Railroad, 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493; Bonnett v. Galveston etc. Ry. Co. (Tex. Civ. App.), 31 S. W. 525; Handley v. Daly Min. Co., 15 Utah, 189, 62 Am. St. Rep. 916, 49 Pac. 295; Fritz v. Salt Lake etc. Light Co., 18 Utah, 493, 56 Pac. 90; Norfolk etc. R. R. Co. v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791, 28 S. E. 578; McDonald v. Norfolk etc. R. R. Co., 95 Va. 98, 27 S. E. 821; Oliver v. Ohio River R. R. Co., 42 W. Va. 703, 26 S. E. 444; McMillan v. Spider Lake etc. Co., 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979; Easton v. Houston etc. Ry. Co., 39 Fed. 65.

However, the rule that a servant assumes the ordinary risks of his employment presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. It is only those risks which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes: Western Stone Co. v. Musical, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; Slack v. Harris, 200 Ill. 96, 65 N. E. 669.

And the doctrine of assumption of risks applies only to known dangers or those which are so obvious as to be readily perceived: Pitts v. Florida etc. R. R. Co., 98 La. 655, 27 S. E. 189; Scanlon v. Boston etc. R. R. Co., 147 Mass. 484, 9 Am. St. Rep. 732, 18 N. E. 209; Myers v. Hudson Iron Co., 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; Bradburn v. Wabash R. R. Co. (Mich.), 96 N. W. 929. It is the duty of a servant to use reasonable care to inform himself of the hazards to which he may be exposed: Chenal v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; McDonald v. Chicago etc. Ry. Co., 41 Minn. 439, 16 Am. St. Rep. 711, 43 N. W. 380. He is bound to use his eyes to see that which is open and apparent to a prudent man: Dillenberger v. Weingartner, 64 N. J. L. 292, 45 Atl. 638; Record v. Chicksaw etc. Co., 108 Tenn. 657, 69 S. W. 334. But he need not inspect appliances and premises to determine whether they are safe. He has a right to rely on his master's inquiry, because it is the latter's duty to inquire; and he may assume that his master has dis-

charged his duty and made inquiry. The fact that a servant has as good an opportunity as his master to know of defects involving risks does not necessarily charge him with their assumption or with contributory negligence: *Starr v. Kreuzberger*, 120 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 787; *Ehlen v. O'Donnell*, 205 Ill. 38, 68 N. E. 766; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676; *Pittsburg etc. Ry. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514; *New York etc. R. R. Co. v. O'Leary*, 93 Fed. 737, 35 C. C. A. 562.

“While the employer may expect that an employé will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery . . . yet the latter is not bound to search for defects, or inspect the appliances furnished him, to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are the duties of the master, and, unless the defects are such as to be obvious to anyone giving attention to the duties of the occasion, the employé has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished”: *Louisville etc. Ry. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. 453; *Indiana etc. Gas. Co. v. Marshall*, 22 Ind. App. 121, 52 N. E. 232. A servant is not chargeable with notice of defective conditions merely because he had the means and opportunity of ascertaining them: *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547, 61 N. E. 143.

In determining the issue of assumption of risk, regard must be had to the age, experience, and mental capacity of the employé, with a view of ascertaining whether he knew and appreciated the danger: *Shebek v. National Cracker Co. (Iowa)*, 94 N. W. 930. See, too, *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152, 21 Am. St. Rep. 438, 23 N. E. 829; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92. It is an actionable wrong for a master to expose to a hazardous employment a servant whom he knows to be lacking in capacity to understand and appreciate the dangers about him, however much he may have been instructed: *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502.

A servant assumes only the ordinary risks incident to the employment, and not the unusual, exceptional, and extraordinary risks and dangers: *Chicago Hair etc. Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51; *Southern Indiana Ry. Co. v. Harrell (Ind. App.)*, 66 N. E. 1016; *Richland's Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785, 28 S. E. 334. The master's negligence, or that of his agent, is a risk not assumed (*Alabama etc. R. R. Co. v. Brooks*, 135 Ala. 401, 33 South. 187; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. 319, 63 N. E. 671; *Boucher v. Robeson Mills*, 182 Mass. 500, 65 N. E. 819; *O'Neill v. Chicago etc. R. R. Co.*, 62 Neb. 358, 86 N. W. 1098;

Christensen v. Lambert, 67 N. J. L. 341, 51 Atl. 702; *Woodward v. Shumpp*, 120 Pa. St. 458, 6 Am. St. Rep. 716, 14 Atl. 378), unless, perhaps, the servant engages or continues in the employment with a knowledge of such negligence: *San Antonio etc. Ry. Co. v. Engelnhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841, 40 S. E. 368. But it has been held that an employé continuing to work after he knows the negligent and dangerous manner in which his employer allows his business to be conducted, does not assume the risk of the negligence: *Richmond etc. Ry. Co. v. Normont*, 84 Va. 167, 10 Am. St. Rep. 827, 4 S. E. 211. A servant does not assume the risk of the negligence of his employer combined with that of a fellow-servant: *McGinn v. McCormick*, 109 La. Ann. 396, 33 South. 382.

An employé is bound to exercise ordinary care for his own safety, and if he is guilty of negligence directly contributing to his injury, he cannot, as a rule, hold his employer answerable: *Columbus etc. Ry. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58, 5 South. 864; *Louisville etc. R. R. Co. v. Stutts*, 105 Ala. 368, 53 Am. St. Rep. 127, 17 South. 29; *Victor Coal Co. v. Muir*, 20 Colo. 320, 46 Am. St. Rep. 299, 38 Pac. 378; *Florida etc. R. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148. It is not contributory negligence on the part of an employé, however, to engage in a dangerous occupation: *Myhan v. Louisiana Elec. etc. Co.*, 41 La. Ann. 964, 17 Am. St. Rep. 436, 6 South. 799. And one continuing in the work after knowledge of defects in the appliances is not necessarily chargeable with contributory negligence: *Parker v. South Carolina etc. Ry.*, 48 S. C. 364, 26 S. E. 669. To charge an employé with contributory negligence in working with defective appliances or in a dangerous place, the danger must be so obvious and glaring that a prudent man would not incur it. Mere knowledge of defects is not sufficient: *Ashland etc. Ry. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16, 75 S. W. 695. Where a servant, in obedience to the requirements of his master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonably probable that it may be safely used by extraordinary caution or skill, he is not thus guilty of concurrent negligence, and the master is liable for a resulting accident: *Swadley v. Missouri Pac. Ry. Co.*, 118 Mo. 268, 40 Am. St. Rep. 366, 24 S. W. 140; *Halloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 35 S. W. 260; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412.

“A man who enters on a necessarily dangerous employment with his eyes open,” says Chief Justice Cockburn, “takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it,

or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he become aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered upon the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of employment, takes it or continues in it with a knowledge of its risks, he must trust himself to keep clear of injury": *Woodley v. Metropolitan Dist. Ry. Co.*, L. R. 2 Ex. Div. 384; *Baltimore etc. R. R. Co. v. State*, 75 Md. 152, 32 Am. St. Rep. 372, 23 Atl. 310.

b. **Criticism—Unequal Footing of the Parties.**—The doctrine of assumption of risks is a matter of contract between master and servant, and may be regarded as only one phase of the broader doctrine expressed in the maxim, "*Volenti non fit injuria.*" The theory is that one seeking employment is not bound to accept a service which he knows or should know involves risks and perils, and that, if he chooses of his own volition to engage in such service, he cannot be heard to complain if disaster overtakes him. The fallacy, or at least the injustice, of this theory consists in assuming that the employé acts voluntarily in the full sense of that term, and in further assuming that the state has not such an interest in the lives of its citizens that the law will protect them against contracting their safety away. Master and servant do not stand on an equal footing.

The means of production, in these modern times, have passed under the control of a comparatively few individuals. They are in the hands of the employers. It is idle to say that the employé need not engage in a service unless he chooses so to do. He has no choice. In many cases he must accept the employment offered, if he would work at all and avoid the consequences of idleness. Moreover, many lines of work are inherently dangerous, such as mining, railroading, and electrical work, yet the performance of such work is necessary and beneficial to the public at large and profitable to the employer. Of the three parties, the public, the employer, and the employé, why should the latter assume the risk? Why should not the employer, if he chooses to embark in an enterprise, dangerous or otherwise, be required to assume the risk of injury to his workmen just as he is required to assume the risk of injury to his appliances and the other risks of the business?

The harsh and unjust doctrine of assumption of risks, if it ever was adequate to the proper protection of employés, has long since ceased to be. And it is gratifying to note that legislatures have made a beginning toward its abolition. Thus, the fellow-servant rule, one of the most vicious phases of the law of assumption of risks, has, at least in certain lines of employment, been abrogated in some jurisdictions: See *Southern Ry. Co. v. Johnson*, 114 Ga. 329, 40 S. E. 235; *Texas etc. Ry. Co. v. Smith*, 114 Fed. 728, 52 C. C. A. 360. And statutes have been enacted in effect prohibiting an employé from assuming the risk of a hazardous appliance forbidden by statute: *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531. And see *Youngblood v. South Carolina etc. R. R. Co.*, 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232. In case a master violates an express statutory duty imposed for the better protection of employés, there are authorities holding that neither the doctrine of assumption of risks nor of contributory negligence applies, although there are decisions to the contrary: See *Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; *Martin v. Chicago etc. Ry. Co.*, 118 Iowa, 148, 91 N. W. 1034, 96 Am. St. Rep. 371, and cases cited in the cross-reference note thereto; monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 586, 587. The policy of holding that the doctrine of contributory negligence does not apply in such a case is not free from doubt, but to hold that the doctrine of assumption of risks does not apply would be in a large measure to nullify the statute, for what means for its enforcement are so efficient as giving employés a right to recover for injuries sustained where the statutory duty of the employer is ignored? For authorities holding that when a master is violating a statute enacted for the protection of employés, the latter do not assume the risk, see *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Narramore v. Cleveland etc. Ry. Co.*, 96 Fed. 293, 37 C. C. A. 499. The opinions in both these cases are very able.

We quote from the Vermont case: "If the doctrine of assumption of risk is to be regarded as contractual, then we hold that the statutory protection cannot be bought and sold, but that the policy of the law forbids it in the interest of public welfare. . . . If it be objected that the statute, when thus read, deprives the laborer of his right to make his own contracts, the answer is to be found in the principle that the state has a right to protect its poor and helpless, even to that extent, if need be. . . . Everybody knows that there are large classes who get their living from day to day in such service as that in which the plaintiff was engaged, who must work where they are working and keep at their job at all hazards, if they would not bring themselves and their families to want. To say to such men, 'If you do not like the conditions, you may quit,' is often only a heartless mockery. The legislature understood this; and the act we are considering was an attempt to better the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us a court should be very slow to construe the beneficial purpose out of such a law, or to make it of no effect. On broad lines of public good and social progress, it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people."

The expression is often met with in the books that a servant assumes the risks of an employment when they are as apparent to him as to the master, or when he has equal means with the master of knowing them. But, as has been very aptly observed, "the master has no right to assume the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume all these things are fit and suitable for the use he is directed to make of them": *Magee v. North Pac. Coast R. R. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114. And even when they have equal knowledge of the danger, it must be remembered that master and servant do not stand on terms of equality. The position of the servant is one of subordination and obedience, and he has a right to rely on the supposed superior skill and knowledge of the master. He is not entirely free to act on his own suspicions of danger, and he cannot be deemed guilty of contributory negligence in obeying an order, unless the danger is so glaring that a reasonably prudent man would not incur it: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; *Halliburton v. Wabash etc. Ry. Co.*, 58 Mo. App. 27.

c. **Servant's Fear of Dismissal.**—A servant's fear of being dismissed must frequently be a powerful incentive to his continuing in a service attended with danger. But the law seems to pay little

regard to this fear as a ground for denying the application of the rule of assumption of risk. It has been held that the fact that it is necessary for an employé to work in order to support himself and family, or the fact that his fear of losing his position is one of the motives which induce him to continue a dangerous work, does not relieve him from assuming the risks: *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585; *Orr v. Southern Bell Tel. Co.*, 130 N. C. 627, 41 S. E. 880; *Hencke v. Ellis*, 110 Wis. 532, 86 N. W. 171. And in *Leary v. Boston etc. R. R. Co.*, 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, it is decided that a servant required to perform duties not embraced in the original hiring, and more dangerous, and undertaking the same, with knowledge of the increased hazard, through fear of losing his place, has no remedy against the master if injured by reason of his ignorance or inexperience. See, too, *Wormwell v. Maine Cent. R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49.

The above decisions bring out the harsh and rigorous character of the doctrine of assumption of risks to which attention has been called in the preceding paragraphs. In *East Tenn. etc. R. R. Co. v. Duffield*, 80 Tenn. (12 Lea) 63, 47 Am. Rep. 319, it is held that where a laborer is furnished a hammer obviously and dangerously defective, and he protests to the foreman against working with it, but is told to use it on pain of losing his place, and the work at hand requires speedy performance, the master is liable if he sustains injury from the defective tool.

d. **Appreciation of the Danger.**—While an employé is generally held to have assumed the ordinary risks of the service which are known or apparent to him, still mere knowledge of a risk or danger, without a full appreciation and comprehension of it, is not conclusive against his right of recovery in the event of injury: *Frye v. Bath Gas etc. Co.*, 94 Me. 17, 46 Atl. 804; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464; *Mayott v. Norcross (R. I.)*, 52 Atl. 894. And there is a distinction between knowledge of defects in premises and appliance and knowledge of the risks and dangers that result from such defects. If an employé has knowledge of a defect, or is chargeable with notice of it because obvious, but is not aware of the danger incident to and attending it, he is not precluded from recovering damages incurred by reason of such defect: *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734; *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13; *Myhan v. Louisiana Elec. etc. Co.*, 41 La. Ann. 964, 17 Am. St. Rep. 436, 6 South. 799; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 Am. St. Rep. 440, 85 Nev. 826; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66, 28 Am. St. Rep. 388, 17 S. W. 748; *Galveston etc. Ry. Co. v. Smith (Tex. Civ. App.)*, 57 S. W. 999. The assumption of risks must rest upon-

positive knowledge of the precise danger, or upon reasonable means of such knowledge, and not on vague surmises of possible dangers: *Dorsey v. Phillips Construction Co.*, 42 Wis. 583.

c. **Judgment of the Parties as to the Danger.**—A servant occupies a position of subordination, and may, within reasonable bounds, rely on the presumed superior knowledge and judgment of his master. Obedience is his primary duty. When ordered to perform work which is not obviously dangerous, or which is of such a character that he cannot see that it cannot be done with safety, or about which there may be a difference of opinion as to the danger, he is not called upon to set up his own judgment against that of his superior, but may rely on his master's judgment and execute his orders, notwithstanding suspicions and misgivings of his own: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; *Ittner Brick Co. v. Killian* (Neb.), 93 N. W. 951; *Delaware River Iron Shipbuilding Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Williams v. Clark*, 204 Pa. St. 416, 54 Atl. 315; *Harrison v. Denver etc. Ry. Co.*, 7 Utah, 523, 27 Pac. 728.

“When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. but if against this judgment is set the judgment of a superior, one to whom, from the nature of the callings of the two men and of the superior's duty, seems likely to make the more accurate forecast, and if to this be added a command to go on with the work and to run the risk, it becomes a complex question of the particular circumstances, whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down”: *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, per Justice Holmes.

“When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself for any failure to do so to the double liability of being expelled from the employment and of being required to pay damages. It is true the master has no right to direct him to do anything not contemplated in the employment, but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon himself the burden of showing a lawful reason for such refusal. This of itself is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith and in the belief that it is rightful; and if in his own judgment it is unwarranted, it is not for the master to insist that the servant was wrong in not refusing obedience. Respect for the master as well

as consideration for his own interest may very properly induce him to waive his own judgment for that of his superior, and instead of engaging in disputes and being perhaps ejected from his employment, to leave questions of doubt for future settlement": *Chicago etc. Ry. Co. v. Bayfield*, 37 Mich. 205, per Justice Cooley.

The law would seem plain where the menace or danger is so uncertain as to cause discussion between the employes and the employer, with the result that the employer dissuades the employe of his apprehension, that the doctrine of assumption of risks cannot be invoked: *Goldthorpe v. Clark-Nickerson Lumber Co.* (Wash.), 71 Pac. 1091; *Harder etc. Min. Co. v. Schmidt*, 104 Fed. 282, 43 C. C. A. 532.

f. **Immediate Direction of Master.**—And when a servant acts under the immediate or personal direction of the master or his foreman, he assumes no risks, except such as are ordinarily incident to the employment, unless the danger is so apparent that a reasonably prudent man would not encounter them. The fact of such direction is an assurance to the servant that he may safely proceed, and he is not bound to search for danger, but may rely on the judgment of his superior: *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799.

g. **Method of Doing Work.**—If the mode of doing work pursued by a master or chosen by his servant is dangerous, and the servant is aware of it, he is not entitled to recover for injuries received: *Lodi v. Maloney* (Mass.), 68 N. E. 229; *Webb v. Gulf etc. Ry. Co.*, 27 Tex. Civ. App. 75, 65 S. W. 684. And when there are two or more methods by which an employe may perform his duties, and he voluntarily chooses the most hazardous, knowing it to be such, he does so at his own risk: *Central of Georgia Ry. Co. v. Mosely*, 112 Ga. 914, 38 S. E. 350; *Hurst v. Kansas City etc. Ry. Co.*, 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695; *Fritz v. Salt Lake etc. Light Co.*, 18 Utah, 493, 56 Pac. 90. The rule is sometimes stated thus: "If there are two ways of performing an act, one of which is attended with peril or danger, and the other is absolutely safe from danger, and the person performing the act upon his own volition chooses the dangerous way and is injured, he cannot call upon his employers to respond in damages": *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319, 55 N. E. 454; *Chamberlain v. Waymire* (Ind. App.), 68 N. E. 306. And sometimes thus: "When there is a comparatively safe and a more dangerous way known to a servant by means of which he can discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury which its use entails": *Morris v. Duluth etc. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661. See, too, *Gilbert v. Chicago etc. Ry. Co.*, 123 Fed. 832. Choosing an easier or more convenient way, rather than a safe one, is at the servant's own risk: *Penwell v. Harvey*, 78 Ill. App. 278.

Still, the fact that there was a safer method by which an employe could have performed his duty is not necessarily conclusive against his right to recover for injuries sustained: *Taylor v. Felsing*, 164 Ill.

331, 45 N. E. 161. If, in the performance of his duties he has no instructions to pursue a particular method, and two or more methods are open to him, he cannot be said to be negligent if, in good faith, he adopts that which is more hazardous than another, when the one adopted is one which reasonable and prudent persons would have adopted under like circumstances: *Florida Cent. etc. R. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148, 33 South. 1010. The choosing of a dangerous method when safer methods are open to an employé does not expose him to the charge of contributory negligence, unless he knows, or a man of ordinary prudence would know, that safer methods are so open, and that the method he is choosing is dangerous: *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531.

When a servant is ordered to change the method of doing dangerous work to one more dangerous, the danger of both modes being apparent and known to him, he assumes the ordinary risks naturally incident to the work: *Smith v. Wilmington etc. R. R. Co.*, 129 N. C. 173, 85 Am. St. Rep. 740, 39 S. E. 805.

III. Obeying Express Orders and Directions.

a. In General.—There may be a modification of the doctrines of assumption of risk and contributory negligence when a servant responds to the direct and express command of the master or his agent, so that he may recover for injuries sustained when otherwise he would be without a remedy: *East Tennessee etc. R. R. Co. v. Duffield*, 80 Tenn. (12 Lea) 63, 47 Am. Rep. 319. It is the duty of an employé to submit himself to the reasonable demands of his employer, not only as to the work to be done, but as to the manner of doing it; and it is his right to assume that his employer will take the necessary precautions to secure safety and will not expose him to unnecessary danger. The position of an employé is one of subordination and obedience to his employer: *Southern Ry. Co. v. Hart*, 23 Ky. Law Rep. 1054, 64 S. W. 650; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180, 44 N. W. 1034; *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317, 16 S. W. 397.

But a servant is not, under all circumstances and at all hazards, bound to obey the order of his master. Obedience to an order may so manifestly jeopardize the safety of the servant as to not only justify, but to demand, disobedience. If he knows and appreciates the danger to which obedience to an order will subject him, if the danger is so obvious and glaring that no person of ordinary prudence would choose to encounter it, he cannot voluntarily place himself in jeopardy, if he has time to deliberate, and then hold his master answerable for the consequences: *Roul v. East Tennessee etc. Ry. Co.*, 85 Ga. 197, 11 S. E. 558; *Whatley v. Macon etc. Ry. Co.*, 104 Ga. 764, 30 S. E. 1003; *Stuart v. New Albany Mfg. Co.*, 15 Ind. App. 184, 43 N. E. 961; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *McDer-*

mott v. Hannibal etc. R. R. Co., 87 Mo. 285; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Smith v. Wilmington etc. R. R. Co., 129 N. C. 173, 85 Am. St. Rep. 740, 39 S. E. 805; Anderson v. Winston, 31 Fed. 528.

Yet he may, without being open to the charge of contributory negligence and without assuming the risk, obey an order of his master or of a vice-principal to perform dangerous or extrahazardous work, unless the danger is so imminent and so apparent and glaring that a man of ordinary prudence would not incur it: Offut v. Columbia Exposition, 175 Ill. 472, 51 N. E. 651; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Stephens v. Hannibal etc. Ry. Co., 86 Mo. 221; S. C., 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; Patterson v. Pittsburg etc. R. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Christianson v. Pacific Bridge Co., 27 Wash. 582, 68 Pac. 191; Miller v. Union Pac. Ry., 4 McCrary, 115, 12 Fed. 600; Miller v. Union Pac. Ry. Co., 5 McCrary, 300, 17 Fed. 67. And when it is reasonably probable that he may proceed by the use of extraordinary caution or skill, the master is liable for a resulting accident: Kehler v. Schwenk, 151 Pa. St. 505, 81 Am. St. Rep. 777, 25 Atl. 130. So he may obey an order, without negligence, when engaged in dangerous work, if the danger is not unusual or the risk not beyond that contemplated by the employment: Wrightsville etc. R. R. Co. v. Lattimore (Ga.), 45 S. E. 453.

Obeing an order which involves peril to life or limb, when an employé does not know and appreciate the danger, does not preclude him from holding his employer responsible for the consequences: Colorado etc. Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Mastin v. Levagood, 47 Kan. 36, 27 Am. St. Rep. 277, 27 Pac. 122; Haley v. Case, 142 Mass. 316, 7 N. E. 877; Mason v. Richmond etc. R. R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, 16 N. E. 698. Even if he has some knowledge of the dangers attendant upon the work he is ordered to do, he is not bound to disobey on pain of assuming the risk, but he may perform the service and hold his employer answerable, unless the danger is such that a man of ordinary prudence would not encounter it. He is not required, when ordered to do a dangerous act, to balance the degree of danger and decide with certainty whether he may safely do as directed: Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; Illinois Steel Co. v. McFadden, 196 Ill. 344, 89 Am. St. Rep. 319, 63 N. E. 671; Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734. He has the right to rely to some extent upon the better or greater knowledge and experience of his master or the person in authority: Southern Ry. Co. v. Shields, 121 Ala. 460, 77 Am. St. Rep. 66, 25 South. 811; St. Louis etc. Ry. Co. v. Rickman, 65 Ark. 138, 45 S. W. 56. And he does not assume those risks which are not so obvious to him as to the master or vice-principal: Fort Worth etc. Ry. Co. v. Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210.

When a servant assumes an extrahazardous employment by order of his master, and under promise to protect him, the latter cannot

excuse his failure to keep his promise by proof that the servant also requested others to see that he was not injured: *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, 12 S. W. 835.

“If an employé, without specific command as to time and manner uses an obviously defective implement, the defect alike open to the observation and within the comprehension of both employer and employé, both stand upon common ground, and no recovery can be had for a resulting injury to either; but when the servant acts under the orders of his master and is injured, the rule is different, for then it cannot be said, with any degree of reason, that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions”: *Norfolk v. Ward*, 90 Va. 687, 44 Am. St. Rep. 945, 19 S. E. 849.

b. **Sudden Commands—Emergency.**—The suddenness of a command and the exigencies of the case have an important bearing on the question whether a servant is justified in obeying an order to perform a dangerous act. If there is no emergency calling for prompt action, then an employé is held to a higher degree of prudence than when there is no time for deliberation; but if the command is sudden, and the act, if done at all, must be done at once without opportunity for deliberation, he may be justified in exposing himself to peril when, in the absence of such circumstances, he would not: *Last Chance Min. etc. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382; *Illinois Cent. R. R. Co. v. Atwell*, 198 Ill. 200, 64 N. E. 1095; *Greenleaf v. Iowa Cent. R. R. Co.*, 29 Iowa, 14, 4 Am. Rep. 181; *Chicago etc. Ry. Co. v. McCarty*, 49 Neb. 475, 68 N. W. 633; *O’Hara v. Cacheo Mfg. Co.*, 71 N. H. 104, 93 Am. St. Rep. 499, 51 Atl. 257; *Allison v. Southern Ry. Co.*, 129 N. C. 336, 40 S. E. 91; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475, 23 Atl. 772.

c. **Positive and Peremptory Commands—Coercion.**—If a master’s orders to go ahead with work are positive or peremptory, when the servant is not apprised of any unusual danger, he does not assume the risks of the service: *Eichholz v. Niagara Falls etc. Mfg. Co.*, 73 N. Y. Supp. 842, 68 App. Div. 441; affirmed in 174 N. Y. 519, 66 N. E. 1107; *Norfolk etc. R. R. Co. v. Ward*, 90 Va. 687, 44 Am. St. Rep. 945, 19 S. E. 849. “The true rule in this as in all other cases is, that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely on the master’s judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master’s opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant’s dependent and inferior position is to be taken into consideration; and if the master

gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous": *Reese v. Clark*, 198 Pa. St. 312, 319, 47 Atl. 994.

"We understand the rule on this subject to be," said Justice O'Rear, in *Illinois Cent. R. R. Co. v. Langan*, 25 Ky. Law Rep. 500, 76 S. W. 32, where the danger was due to an inadequate force of men, "that if the danger or risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant will act at his peril in undertaking it. But where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists after objection, that the servant proceed with the work, or assures him that the force is adequate, or the machinery safe, then the servant has a right to rely on the master's presumed superior knowledge. The risk is thereby assumed by the master, and he impliedly assures the servant, who relies upon his statement, or who obeys his positive direction, that if he, the master, is in error as to the safety, he will indemnify the obedient servant against the consequences."

If a master coerces his servant into danger, the rule that a servant voluntarily engaging in a service which he knows to be dangerous does not apply: *Wells & French Co. v. Gortoski*, 50 Ill. App. 445. But the request of a foreman that an employé do the best he can while working alone, is not such coercion as justifies him in undertaking the work without help, when he knows that an attempt to do so is dangerous: *Mayott v. Norcross (R. I.)*, 52 Atl. 894. Nor is a threat to discharge a servant, if he refuses to obey, such coercion: *Sweeney v. Berlin etc. Elevator Co.*, 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358.

d. **Assurance of Safety by Master.**—An employé who fears or knows there is danger does not necessarily take the risk thereof by yielding to the assurance and command of his employer and working in the presence of the danger: *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 787; *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071. Indeed, when an employé expresses a doubt or a fear that danger attends the service, and his employer or foreman assures him that his apprehensions are unfounded, and that he may proceed with safety, he has a right to rely on such assurance, especially when the master's duty and opportunity render him more capable of framing a correct judgment: *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Chicago Screw Co. v. Weiss*, 203 Ill. 536, 68 N. E. 54; *Laech v. Stratton*, 101 Ky. 672, 42 S. W. 756. "Where a servant has knowledge of a defect and calls the attention of his master to it, and is assured by him that everything is right, and told to go on with his work, the servant will not be held to have

assumed the risk of so doing, unless the danger was so manifest that a person of ordinary prudence and caution would not have incurred it": *Harte v. Fraser*, 104 Ill. App. 201. One cannot, however, justify his continuance in a service which he knows and realizes is dangerous, merely on the assurance of his employer that it is safe: *Rohrbacher v. Woodward*, 124 Mich. 125, 82 N. W. 797.

Ordinarily, there is an implied assurance of safety when an employer orders work to be done: *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Herdler v. Buck's Stove and Range Co.*, 136 Mo. 3, 37 S. W. 115.

e. Work Beyond Scope of Employment.—"Where a master commands his servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to specific commands of his master, goes and does the work in the way, and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it": *English v. Chicago etc. Ry. Co.*, 24 Fed. 906, per Justice Brewer. See, too, *Worthington v. Goforth*, 124 Ala. 656, 26 South. 531; *Dallemand v. Saalfeldt*, 175 Ill. 310, 67 Am. St. Rep. 214, 51 N. E. 645; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630, 45 N. E. 817; *Brown v. Ann Arbor R. R. Co.*, 118 Mich. 205, 76 N. W. 407; *Chicago etc. Ry. Co. v. McCarty*, 49 Neb. 475, 68 N. W. 633; *Gulf etc. Ry. Co. v. Newman*, 27 Tex. Civ. App. 77, 64 S. W. 790. This rule would seem especially applicable to a servant who is called from a place of safety and directed to do a temporary work with which he is not familiar or in which he is not skilled: See *Indiana etc. Gas Co. v. Marshall*, 22 Ind. App. 121, 52 N. E. 232; *Branz v. Omaha etc. Ry. etc. Co. (Iowa)*, 94 N. W. 906; *Cole v. Chicago etc. Ry. Co.*, 71 Wis. 114, 5 Am. St. Rep. 201, 37 N. W. 84. The rule would, of course, be the same where the change of work is directed by a vice-principal instead of by the master himself: *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340, 30 Pac. 1037.

The law governing cases of this class has been stated thus: If a master requires of a servant a service outside of the duties ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious. If the apparent danger is such that a person of ordinary prudence would refuse to encounter it, the employé proceeds at his peril; otherwise, he may undertake the service, using care proportionate to the apparent increased risk, and if, in so doing, he is injured by the employer's fault, he may recover therefor: *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187. Compare *Leary v. Boston etc. R. R.*, 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115.

SINGER SEWING-MACHINE COMPANY v. RIOS.

[96 Tex. 174, 71 S. W. 275.]

MORTGAGE OF CHATTELS.—A Provision Authorizing the Mortgagee to Take Possession on default of the payment of the debt contained in a mortgage of chattels is not against public policy, but is valid, and thereunder he is authorized to take such possession, though against the wish of the mortgagor. (pp. 903, 905.)

Faulk & Patterson, for the appellant.

Brooks & Shelley, for the appellee.

176 GAINES, C. J. This case comes to us upon the following certificate:

“The court of civil appeals of the third supreme judicial district of Texas certifies that the above styled and numbered cause, on appeal from the county court of Travis county, Texas, is now pending in the court of civil appeals; and states that the appellee’s cause of action is for damages alleged to have been sustained by reason of the defendant’s agent entering the place of business of plaintiff, in the city of Austin, and there and then taking possession of a certain sewing-machine, which defendant had sold to the plaintiff on the installment plan. The damages alleged the sixty-five dollars, the value of the machine; that his business as a merchant tailor has been interfered with and obstructed, and that he has been deprived of the use of the machine, and that on account of being deprived of the same, the work done by him has been greatly decreased; with amount of actual damages alleged to be two hundred and fifty dollars, with also a claim for exemplary damages at two hundred dollars.

“Among other facts pleaded in the defendant’s answer, there are averments to the effect that the sewing-machine was sold to the plaintiff on the installment plan; and that there was then due on the same a certain amount, which was unpaid, and that at the time of sale a mortgage was retained on the machine to secure the amount that may become due; and that there was a stipulation in the mortgage which authorized the defendant to take possession of the sewing-machine, either with or without process of law; that the plaintiff had failed and refused to pay the unpaid purchase money when due, and that the machine was taken quietly and peaceably, without the use of force, by virtue of this stipulation in the mortgage, which is as

follows: 'If said mortgagor shall fail to pay any installment as it becomes due, then all said installments unpaid shall at once become due and payable, and said mortgagee or its representatives shall have the right, and is hereby authorized and empowered, to take possession of said goods and chattels, with or without process of law, said mortgagor hereby waiving any claim or action for trespass or damage on account of said taking.'

"It is contended by the defendant that under this provision in the mortgage it took the machine, and that it was authorized to take the same, and this fact was pleaded as a defense to the plaintiff's cause of action.

"The trial court sustained a demurrer to so much of the defendant's answer as sought to justify the taking by virtue of the above provision in the mortgage; but submitted to the jury the issue as to whether or not the machine was taken from the possession of the plaintiff by and with the consent of the plaintiff; and if such was the case, to find in favor of the defendant.

¹⁷⁷ "The defendant upon the trial of the case asked a charge, which was by the court refused, presenting to the jury the issue as pleaded, that the defendant had authority to take possession of the machine by virtue of the agreement contained in the mortgage, as above set out.

"There is evidence in the record which shows that the machine was taken from the building occupied by the plaintiff as a tailor-shop without his consent and against the express wishes of the party in whose possession it was at the time it was taken; that the machine was then in use by the plaintiff in his business as a tailor. And there is also evidence which tends to show that the defendant in taking the machine used no force or violence, and no breach of the peace was committed at that time. It also appears as a fact that at the time the machine was taken there was a balance due the defendant as a part of the purchase price of the machine. It is also pleaded, and there is evidence to sustain the averments, that the machine was taken by the defendant for the purpose of enforcing the provision of its mortgage and lien on the machine.

"Verdict and judgment in the trial court were in favor of the plaintiff on all of the items of damages claimed, with a credit in favor of the defendant for the balance due upon the machine, and for the balance remaining, judgment was rendered in plaintiff's favor.

“Under the above statement, the court of civil appeals for the third supreme judicial district of Texas certifies to the supreme court of Texas the following question :

“Although the taking of the machine at the time was without the consent of the plaintiff, did the stipulation contained in the mortgage, as above quoted, authorize the defendant to enter the place of business of the plaintiff and take actual possession of the machine, without then and there first obtaining the permission and consent of the plaintiff? In other words, did the consent given in the provision of the mortgage quoted authorize the taking, where it is, as here, shown by the facts that no force or violence or breach of the peace was committed in taking the machine? And if such taking was justifiable under the terms of the mortgage as quoted, would such fact be a defense, either in whole or in part, to the plaintiff's cause of action?”

We are of the opinion that the question should be answered in the affirmative. Clearly, unless the stipulation in the mortgage which purported to give the appellant the right to take possession of the sewing machine upon default of payment be held of no effect, its agent committed no wrong by a peaceable seizure of the property for the purpose of paying the debt. The stipulation is valid, unless it is contrary to public policy. According to the well-known dictum of an English judge, public policy “is a very unruly horse, and when you once get astride it, you never know where it will carry you”: *Richardson v. Mellish*, 2 Bing. 229. This striking illustration admonishes us that the terms “public policy” are vague in meaning and dangerous of application,¹⁷⁸ and that unless we exercise due discrimination, we are likely to fall into error when we come to apply them to the construction of a contract with a view to determine the validity of its provisions. Freedom of contract is the rule, subject to the exception, that a party cannot bind himself to do that which is by law prohibited, or declared to be illegal, or which is manifestly detrimental to public morals or the public good. The question then arises, What consequence injurious to the public is a stipulation of the character of that under consideration calculated to produce? To this it may be vaguely answered, that it tends to a breach of the peace. But the reply is, so do many other contracts the validity of which are never called in question. Certainly no breach of the peace is likely to occur provided the mortgagor in such case does what he has contracted to do and what it is his duty to do, namely, in case of default to surrender the property upon de-

mand of the mortgagee. On the other hand should he make forcible resistance, this does not justify the mortgagor in using force to overcome his resistance. The law hardly proceeds upon the assumption that either party will violate his agreement, and that therefore a breach of the peace may arise.

The proposition that such a stipulation is valid, and that the mortgagee may take peaceable possession of the property without the consent and even over the protest of the mortgagor, is sustained by the great weight of authority. The following cases are in point: *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *Walsh v. Taylor*, 39 Md. 591; *North v. Williams*, 120 Pa. St. 109, 6 Am. St. Rep. 695, 13 Atl. 723; *White Sewing Machine Co. v. Connor*, 23 Ky. Law Rep. 1125, 64 S. W. 841; *Heath v. Randall*, 4 Cush. 195; *Satterwhite v. Kennedy*, 3 Strob. (S. C.) 457; *Nichols v. Webster*, 1 Chand. (Wis.) 203. Such is the rule recognized by the text-writers: *Jones on Chattel Mortgages*, sec. 434; 1 *Cobbey on Chattel Mortgages*, sec. 510; *Pingrey on Chattel Mortgages*, sec. 989; *Boone on Mortgages*, sec. 276.

The authorities relied upon in support of the proposition that the stipulation in question did not justify the taking of the property against the consent of the mortgagor, are from our own courts. The first is *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272. As to the evidence adduced upon the trial, the case is meagerly reported. The petition charged that in connection with the taking the defendants threatened the plaintiff with violence and committed an assault upon her. How these allegations were sustained by the proof the report does not disclose. The court charged the jury that if the property was taken without the consent of the plaintiff, and "if the manner of defendants, or either of them, in the taking was by threats, or in an insolent, overbearing and insulting manner done in such a way as would naturally outrage the feelings of plaintiff," then they should find for plaintiff. It was held that this charge was correct. In the opinion the court say: "We think the charge of the court to the effect that if the instrument alleged to have been executed by Salie Maxey was genuine, as asserted¹⁷⁹ by defendants, it furnished no justification or defense for the defendants, is correct. Without such an instrument they had the right to remove the property peaceably and with the consent of the parties having it in lawful possession, while with it they had no right to make such removal forcibly or

against the will of plaintiffs." We think in so far as the opinion asserts that a peaceable taking against the will of the mortgagor was wrongful, it is clearly a dictum. The petition alleged the taking of the property, but did not state its value; and we understand the suit was to recover damages for an assault and other insulting conduct. Judging by the report of the case the question of the right to take the property peaceably without the consent of the plaintiff was not discussed in the briefs of counsel upon either side; and, as we think, was a point not necessarily involved in the determination of the suit.

In *Gillette v. Moody*, 54 S. W. 35, the court of civil appeals for the fourth district held, that under a similar provision in a chattel mortgage it was unlawful to enter a house by force and threats for the purpose of taking and carrying away the mortgaged property. That is not the question certified in this case.

The case of *Culver v. State*, 42 Tex. Cr. Rep. 645, 62 S. W. 922, was a conviction for an aggravated assault in which the court of criminal appeals held, that the fact that the assault was made in an attempt by the defendant to take mortgaged property under a like stipulation in a chattel mortgage was not a justification of the act. What is said in the opinion, to the effect that the defendant had no right to take the property without the consent of the assaulted party, was not involved in the decision of the case. Clearly, the right to take the property did not justify the assault.

So far we have not adverted to the case *Harling v. Creech*, 88 Tex. 300, 31 S. W. 357. In that case in answering a certified question, this court, after construing the instrument in controversy to be a chattel mortgage, said: "The instruments being chattel mortgages, the vendor had the rights of a mortgagee under a chattel mortgage containing the stipulations of right to take possession, which would be to take possession of the property if he deemed himself insecure, or the debt not being paid, and to hold or dispose of the property in the character of mortgagee, and not as owner." It is claimed by counsel for appellee that this was a dictum. Without pausing to inquire whether the remark was called for in a decision of the question there certified, we deem it sufficient to say, that if a dictum, it is in our opinion a correct announcement of the law.

Conditions in Chattel Mortgages authorizing the mortgagee to take possession, sell, or declare a forfeiture at any time he may deem himself insecure, are discussed in *Nash v. Larson*, 80 Minn. 458, 81 Am. St. Rep. 272, 83 N. W. 451; *Newlean v. Olson*, 22 Neb. 717, 3 Am. St. Rep. 286, 36 N. W. 155; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045. A mortgagee to whom authority is given by the mortgage to take possession of the property and sell it for the payment of his debt cannot be sued in trover by the mortgagor for so doing: *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337.

GARRISON v. COOKE.

[96 Tex. 228, 72 S. W. 54.]

CONTRACTS.—Time is of the Essence of a Contract when one party agrees to pay money to the other in consideration of the doing of an act by such other within the time specified. (p. 908.)

CONTRACTS—Time, When of the Essence of.—If one party agrees to pay to the other a sum specified in consideration that such other will construct, equip, and operate a line of railroad and run trains between designated points on or before a day named, time is of the essence of the contract, and there can be no recovery thereon if the acts required do not take place at or before such date. (p. 909.)

Blount & Garrison, for the appellant.

H. N. Nelson, W. R. Anderson, J. H. Long, and J. G. Woolworth and Spencer & Scott, for the appellee.

230 GAINES, C. J. The following questions have been certified for our determination:

“In this cause, now pending before this court on motion for rehearing, we are advised that a number of other claims of a like nature growing out of the same transaction are dependent upon the result of this case, and for that reason, and because this court is not unanimous in the conclusion already reached to affirm the judgment and are in doubt as to the correctness of our judgment, we certify for your decision the questions hereafter set out.

“The facts as disclosed by the record are as follows:

“Some time in the spring of 1898, T. S. Garrison, the appellant, induced J. W. Cooke and other citizens of Carthage, Texas, to execute and deliver to him the following instruments with the amount for which each was to be bound set opposite the respective signatures:

“The State of Texas, }
Panola County. }

“Know all men by these presents that we and each of us whose names are subscribed below, for and in consideration of T. S. Garrison constructing, equipping and operating a line of railroad from Timpson, Shelby county, Texas, to Carthage, Panola county, Texas, and the running of daily trains between said points for the accommodation of freight and passenger traffic on or before the first day of October, 1898, agree to pay the amounts set opposite our respective names to such persons as said T. S. Garrison designates, said amounts to be paid when the road is completed and daily trains are running over same to the town of Carthage.

“J. W. Cooke\$350.00”

“The time of completion to Carthage was subsequently extended by agreement of parties to November 1, 1898. The appellant proceeded with the construction of the proposed road, which was known as the Marshall, Timpson and Sabine Pass Railroad, and by about the first of the year 1899 had completed it to within about half a mile of Carthage. Appellant then sold the road to the owners of competitive railroad, the Texas, Sabine Valley and Northwestern Railroad, and these parties by March 1, 1899, but not before, completed the proposed road to Carthage and had daily trains running thereon as stipulated in the contract. When the road was sold to them by appellant it was stipulated by him that it should be completed to Carthage as per contract though it would have suited the purchasers better to construct it by a different route to another point. On the completion of the line to Carthage appellant demanded the subscription but appellee refused to pay, whereupon this suit was brought.

“Appellee defended, first, upon the ground that time was of the essence of the contract, and that, as the road was not completed by November 1st, his liability for the subscription did not attach; and second, that as the road was not built to Carthage by appellant, but was sold out to and completed by parties who already had a railroad to Carthage, he was discharged from liability.

“Parol evidence was admitted to the effect that the subscribers had ²³¹ contracted that the road should be in operation to Carthage by October or November 1st, because they expected it, by competition with the other railroad, to affect

the rate of freight on cotton to their advantage. A trial by jury resulted in a verdict for appellee.

"Questions: 1. Does the subscription contract show upon its face that time was of the essence of the contract?

"2. Did the trial court err in hearing proof as to the situation of the parties and the fact that the subscribers expected to derive benefit from the construction of the road by the date named, in the way of reduction in freight rates on cotton?

"3. Would the fact that appellant did not complete the road himself, but sold out to a rival road which completed it, constitute a defense to the action?

"4. If parol evidence as to the situation of the subscriber at the date of the contract is admissible in explanation of its meaning and in aid of its construction, must such evidence be confined to the subscriber in question or may such inquiry include his cosubscribers who signed contemporaneously with him?

"5. Do the facts show that time was of the essence of the contract?"

"It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and 'where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do.' Accordingly, when by the terms of a contract one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterward claim the performance of the contract if the stipulation as to time were construed according to its literal terms. The rule of the common law was that 'time is always of the essence of the contract.' When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it": Pollock on Principles of Contracts, 462. The rule is also announced by the elementary text-writers that, at law, time is in general of the essence of the contract: Bishop on Contracts, sec. 1344; Anson on Contracts, 331; Clark on Contracts, 596. See, also, Beach on the Modern Law of Contracts, sec. 617 et seq. We understand the rule to apply where one party agrees to pay money to the other in consideration of the doing of an act by such other within a specified time. In general in such a case the promise to pay cannot be enforced, unless the act

be performed within the time. Questions calling for its application have frequently arisen in cases like the one now before us—that is to say, in cases of subscriptions for the construction of railroads and other like improvements, and so far as we have been enabled to discover, where there is nothing on the face of the contract itself tending to show that time was not of the essence of the engagement, it has been nearly if not quite uniformly held, that ²³² if the work was not completed within the specified time, the promisor was not liable. Such was the case of *Slater v. Emerson*, 22 How. 28. There “a railroad company became embarrassed, and were unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day,” and it was held that the contractor could not recover because he had not finished the work within the stipulated time. The case was cited with approval and the rule was followed in the following cases: *Hall v. United States*, 96 U. S. 28; *Jordan v. Newton*, 116 Mich. 674, 75 N. W. 130; *Persinger v. Bevill*, 31 Fla. 364, 12 South. 366. See, also, to same effect, *Indianapolis etc. R. R. Co. v. Holmes*, 101 Ind. 348; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652. The principle has been applied even as to subscriptions for stock in a railroad company where the subscription is made upon condition that the road is to be completed within a certain time. But the case before us is a stronger one. A stockholder acquires an interest in the company, a property right; a promisor of a bonus to a railroad company acquires no right by a construction of the road. He looks only to the incidental advantages that may result from such construction. It would seem but reasonable that in the latter case the promisee should be held to a rigid compliance with the conditions of the contract. In the case of *the Presidio Min. Co. v. Bullis*, 68 Tex. 581, 4 S. W. 860, this principle was held applicable to a contract for the sale of real estate, to which ordinarily a less rigid rule applies. In that case the court say: “It was left entirely at the option of Cooke whether he would take the land at the end of the year or not; and, in such cases, it is the general rule, to which this case is no exception, that time is of the essence of the contract.” So in this case the appellant did not bind himself to do anything, and the appellee merely promised to pay in consideration of the construction of the railroad on or before a certain day.

A contract to pay money in consideration that the promisee will build a railroad by a certain time implies very clearly that that money is to be paid only on condition that the road be constructed within the time; and in our opinion time in such a case is of the essence of the contract. The fact that the parties by subsequent agreement extended the time for the completion of the road, shows that such was their own construction of the contract, and, even if it were a doubtful matter, ought to have a controlling effect in determining their intention. The cases mainly relied upon by counsel for appellant are *Traer v. Stuart*, 46 Iowa, 15, *Front Street etc. Ry. Co. v. Butler*, 50 Cal. 574, and *Seley v. Railroad Co.*, 2 Wills. App. Cas., sec. 87. The contract in each of the two cases first mentioned contained special stipulations as to the time of payment, from which the court drew the inference that the time of special performance was not an essential feature of the contract. They are, therefore, whether correctly or incorrectly decided, distinguishable from the present case. *Seley v. Railway Co.*, 2 Wills. App. Cas., sec. 87, ²³³ is based principally upon the authority of the other two cases, and may also be distinguished from the case before us by reason of a difference in the stipulations in the contract.

We answer the first question in the affirmative, and since the parol evidence introduced did not tend to show that the intention of the parties was not to make time an essential element in the agreement, we deem it unnecessary to answer the others.

Time as the Essence of Contracts is considered in the note to *Jones v. Robbins*, 50 Am. Dec. 597-600. If time is expressly made of the essence, the provision will not be ignored in equity: *Glock v. Howard etc. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713. Time is an essential element of a contract whereby one binds himself to convey a right of way on condition that within four months the construction of a railroad shall commence, and within three years be completed: *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109, 5 Am. St. Rep. 337, 4 South. 197.

NOLAN v. MOORE.

[96 Tex. 341, 72 S. W. 583.]

MARRIED WOMAN—Conveyance of Executed by Attorney in Fact.—A power of attorney executed by a married woman authorizing the donee of the power to sell her separate real property is valid, and her conveyance executed under such power, in which her husband joins, transfers such property under a statute declaring that a husband and wife shall join in a conveyance of real estate, the separate property of the wife, and that no such conveyance shall take effect until acknowledged by her privily and apart from her husband before some officer authorized by law to take the acknowledgment of deeds. (p. 913.)

Frost, Neblett & Blanding, for the plaintiffs in error.

Know & Johnson and Simpkins & Mays, for the defendants in error.

343 BROWN, A. J. On the twenty-second day of January, 1884, John T. Moore and Lula H. Moore were husband and wife and have so continued down to the present time. They resided at that time in Jefferson county, in the state of Mississippi. In her separate right Lula H. Moore owned in Texas the land in controversy, and on the day above stated, she being at home in Mississippi and John T. being in the state of Texas, the said Lula H. Moore executed and acknowledged, in the manner and form required by the laws of Texas, a power of attorney to James L. Autry, of Navarro county, Texas, by which she empowered and authorized the said Autry to sell and convey the land sued for in this case, as well as other lands in Texas. John T. Moore did not join in the power of attorney, which was forwarded to James L. Autry and recorded in Navarro county on the fourteenth day of February, 1884. On the thirteenth day of August, 1884, John T. Moore joined with James L. Autry, who acted under the said power of attorney for Lula H. Moore, in executing a deed which conveyed the land sued for to F. L. Smithey for a cash consideration of nine hundred dollars then paid. At the date of the trial the land was worth fifteen dollars per acre without regard to the improvements, and with the improvements it was worth thirty dollars per acre. On the sixteenth day of February, 1889, Lula H. Moore, joined by her husband, instituted this suit against the plaintiffs in error, who claimed under Smithey, to recover the land, and judgment was given

by the trial court in favor of the plaintiffs, which was affirmed by the court of civil appeals.

The following article of the Revised Statutes prescribes the mode by which a husband and wife may convey real estate, the separate property of the wife: "Art. 635. The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to, in the mode pointed out in article 4643."

The term "conveyance" as used in the above article signifies the deed which transfers the title from the wife to the purchaser: *McCabe v. Heirs of Hunter*, 7 Mo. 357. The word "join" means that the husband and wife must unite—that is, act together in the execution of the deed. The question involved in this case is, Must the husband and wife each in person execute the same paper, deed or power of attorney to make the conveyance their joint act?

It has been settled by this court that the husband and wife need not personally sign the deed, but may jointly appoint an agent by a power of attorney, duly executed by them, who, acting for both, can make a valid conveyance of the wife's separate real estate: *Patton v. King*, 26 Tex. 685, 84 Am. Dec. 596; *Warren v. Jones*, 69 Tex. 462, 6 S. W. 775. In each of the cases cited, the husband and wife appointed an agent by a power of attorney, ⁸⁴⁴ jointly executed by them, and this court held that the conveyance made by such agent was valid.

It has likewise been held by this court that the husband and wife need not execute the conveyance at the same time, but the husband having signed and acknowledged a deed conveying his wife's separate real estate, she may at a subsequent time sign and acknowledge the same instrument and thereby make it effective from the time of her signature and acknowledgment: *Halbert v. Bennett* (Tex. Civ. App.), 26 S. W. 913. In the case last cited, the husband held a power of attorney from his wife empowering him to sell certain land, her separate estate, which he conveyed, signing his wife's name by himself as agent and his own name as her husband. Two years after that date the wife signed and acknowledged the same deed and the court of civil appeals of the fifth district held the deed to be valid from the

time of her signature and acknowledgment. This court refused a writ of error in that case, thereby adopting the opinion of the court of civil appeals, there being but one question presented by the application. It is likewise established by this court that the husband may empower the wife to sell her separate real estate, acting for herself and as his agent: *Rogers v. Roberts*, 13 Tex. Civ. App. 190, 35 S. W. 76. In that case the court likewise refused a writ of error, there being but the one question presented by the application. We conclude that a married woman, by a power of attorney executed and acknowledged by her alone, may authorize a third person to sell and convey her land, and that such person acting with the husband can convey her separate real estate.

John T. Moore and his wife joined in the deed to Smithey as effectually as if both had been represented by Autry, or Moore had been represented by his wife, she acting for herself. The privy acknowledgment of the power of attorney guarded the wife against undue influence by her husband, and she had the right to revoke the power at any time before the deed was delivered. The power of attorney was inoperative until the husband joined in the deed which secured his right to manage the property. Every beneficial purpose of the law was accomplished: *Patton v. King*, 26 Tex. 685, 84 Am. Dec. 596. The trial court erred in excluding the power of attorney and deed, for which the judgment must be reversed. We cannot render judgment because the evidence was excluded, therefore the cause will be remanded, the defendant in error to pay all costs of the court of civil appeals and of this court.

Reversed and remanded.

Powers of Attorney by married woman are discussed in the monographic note to *Security Sav. Bank v. Smith*, 84 Am. St. Rep. 761-772.

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RAYMOND v. YARRINGTON.

[96 Tex. 443, 72 S. W. 580, 73 S. W. 800.]

CONTRACTS not to Engage in Business—When Construed to be Joint and Several—A contract by two parties signed in their individual names, agreeing not to enter into or conduct a milling business within a designated territory without the permission of J. H. or his assigns, binds each of such parties not to engage in such business, and is violated when one of them so engages, and both thereupon become liable for the resulting damages. (pp. 917, 921.)

CONTRACT—Liability of Third Person for Causing Breach of. Where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing such breach for the damages resulting therefrom. (p. 920.)

DAMAGES for Violating a Contract—Vagueness of Evidence—When does not Preclude a Recovery.—Where a contract not to engage in a specified business has been violated, he who is damaged thereby is not precluded from recovering by the fact that his evidence does not show to what extent his business was diminished by the violation of the contract not to compete with him. To require accuracy in such a case would be to deny a remedy for the wrong. (p. 922.)

James W. McClendon and Fiset & Miller, for the plaintiff in error.

D. W. & D. H. Doom and West & Cochran, for the defendants in error.

446 GAINES, C. J. This suit was brought by plaintiff in error against defendants in error. General and special demurrers to the petition were interposed by all the defendants; and all were sustained, except those of defendant Harwood. His exceptions were overruled, but upon the trial a verdict was instructed in his favor. A judgment was accordingly entered for all the defendants; and it was affirmed on appeal to the court of civil appeals.

We will set out in substance and as briefly as practicable the facts alleged in the petition. In the first paragraph, Yarrington, Harwood, McDowell, Kaufman and the E. O. Stanard Milling Company, a corporation, are made defendants in the suit, and their respective residences are stated.

In the second paragraph it is alleged that Yarrington and Harwood were partners engaged in a brokerage or agency business and had built up a profitable trade selling flour, meal, bran and other milling products for the defendant corporation and others engaged in a like business; that the firm had con-

tracts with such corporations and others which gave them an exclusive right to sell the products of their employers in a certain designated territory, of which the city of Austin was a part; but that the contracts were for no definite period of time and were terminable at the pleasure of either party upon notice to the other. It was further alleged that for the consideration of one thousand dollars the defendants Yarrington and Harwood sold to the plaintiff and to his brother, one Frank Raymond, as partners, such agency business in such territory and bound themselves not to conduct at any time thereafter, either individually or as partners, a milling agency business therein; and that the defendant milling company knew of said contract and agreed that the plaintiff and his brother should take the place of Yarrington and Harwood as their agents in the designated territory and should there represent them exclusively in the sale of their products. It was also averred in such paragraph that in the agreement it was stipulated in behalf of the defendant milling company that the plaintiff and his brother should retain defendant Yarrington to assist them in their business for the period of ninety days, and that thereby the defendant milling company impliedly agreed to retain the plaintiff and his brother as their agents in the designated territory for a reasonable time, provided they should prove to be satisfactory agents; and that but for the conduct of the defendants as thereafter alleged the agency would have continued for a period of five years.

In the third paragraph it is further averred that, in order to deprive the plaintiff and his brother of the advantages to accrue to them under their contract with Yarrington and Harwood, the defendants conspired to break up the agency business of plaintiff and his brother in the following ⁴⁴⁷ manner; that to obtain the one thousand dollars paid for the business, Harwood entered into the contract with the intention of not carrying out his obligation and with the purpose of again entering upon the business of an agency for the sale of mill products in the territory named in the agreement; that "in pursuance of said conspiracy" he began in August, 1898, to sell the products of other mills in such territory, and that about December of that year the defendant milling company limited the territory of Raymond and brother, as their agents, to the city of Austin. That prior to February 1, 1899, defendants McDowell and Kaufman, acting in their own behalf and as agents of the defendant milling company, took part in the

original illegal purpose of Harwood to violate said contract, and with full knowledge of the rights of the Raymonds, conspired and agreed with him that McDowell and Harwood should take the place of the Raymonds as the agents of the defendant milling company in the territory designated in the original contract between the Raymonds on the one part and Yarrington and Harwood on the other; and that thereupon the defendant milling company did employ McDowell and Harwood as their agents for such territory and did discontinue the employment of the Raymonds. It is also alleged in this paragraph, that about December 1, 1898, the defendant milling company limited the agency of the plaintiff and his brother to the city of Austin, and that they continued to act as agents for such restricted territory until February 1, 1899. Then follow allegations of a loss of profits from the conduct of defendants in the sum of ten thousand dollars and that their acts were done knowingly and over the protests of the Raymonds, with a claim for exemplary damages.

In the fourth paragraph are found similar allegations as to the destruction of the business of the plaintiff and his brother and the damages, which resulted therefrom, all of which are alleged to have accrued from a conspiracy on part of defendants McDowell, Kaufman, the milling company and Harwood to cause Harwood to break his contract with the Raymonds.

The fifth paragraph repeats the allegations as to the damages.

The sixth alleges an assignment for value by Frank Raymond of his interest in the cause of action to the plaintiff.

Were the demurrers of the defendants other than Harwood properly sustained? A copy of the written contract between the plaintiff and Yarrington and Harwood is made an exhibit to the amended petition and contains this provision: "We specially agree and bind ourselves not to enter into or conduct a milling agency business in the city of Austin or the territory above designated without the written permission of J. H. Raymond, Jr., or his assigns." It appears from the averments in the petition that Harwood only engaged in a milling agency business in the prohibited territory after the contract was executed; therefore, unless the contract properly construed bound each of them not to conduct such business, no cause of action is shown against either of the defendants. Do Yarrington and Harwood, by the contract, bind themselves ⁴⁴⁸ that neither of them shall sell mill products in the prohibited territory, or merely that both shall not? This question we referred back to the counsel for written arguments and the arguments have been

filed. From the cases there cited we feel constrained to hold that it was a breach of the contract for either Yarrington or Harwood to again engage in the business in question in the designated territory. In the case of *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, a partnership known as Welsh Brothers sold out a business as undertakers to the plaintiff Morris and bound themselves "not to start the undertaking business in Denison City, Texas, so long as said S. B. Morris is in the business." Subsequent to the execution of the contract one of the partners only engaged in the prohibited business, and it was contended that this was no breach of the stipulation. It was held, however, that the action of the one was a breach of the contract. The contract was signed "Welsh Brothers"; and counsel for defendants in error frankly concede that unless this case can be distinguished by the fact, that the contract of Yarrington and Harwood is signed by each of them in their individual names only, it is conclusive of the question against them. We do not think the cases can be distinguished. The contract of Yarrington and Harwood, though signed by them individually, is as much a contract as partners as if it had been signed in the partnership name. The decision in *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, is in accordance, as we think, with the weight of authority. See opinion of Alvey, chief justice, in *Love v. Stidham*, 18 App. D. C. 306, 53 L. R. A. 397, and cases there cited. Contra: *Streichen v. Fehleisen*, 112 Iowa, 612, 84 N. W. 715.

The case then made by the petition is that the defendants, other than Harwood, conspired to induce and did induce the latter to break his contract to the damage of the plaintiff. The important question is, Does this show a cause of action? The point has never been decided in this court, and the authorities upon it elsewhere are in conflict. We think, however, the great weight of authority is in favor of an affirmative answer to the question.

We will first review briefly the cases in the English courts in which the point has come up for consideration.

The first is the leading case of *Lumley v. Gye*, 2 El. & B. 216, which was decided in 1853. In that case the plaintiff, the lessee of a theater, sued the defendant, alleging that a certain singer had been engaged by the plaintiff to sing at his theater and none other, and that while she was under such contract the defendant maliciously induced and enticed her not to perform for him as she had agreed to do. Upon demurrer to the declaration it was held, by three of the judges, that it

showed a good cause of action. Justice Coleridge, one of the four judges who sat in the case, dissented. Practically the same question came before the court in the case of *Bowen v. Hall*, L. R. 6 Q. B. Div. 333. It was again held that an action would lie for inducing one under a contract of service to another to leave the service. Lord Coleridge, then the chief justice of the common pleas, dissented from the opinion of the majority.

⁴⁴⁹ Again, in 1893, the case of *Temperton v. Russell* (1893), L. R. 1 Q. B. Div. 715, came up for decision. There the plaintiff was a contractor and builder and had made contracts with third persons to supply him with material to be used in his business. The defendants were a committee of certain trades unions; and for the reason that plaintiff would not comply with certain rules laid down by the unions, they induced those who had contracted to deliver him material to break their contracts, and also conspired to prevent others from entering into contracts with him. It was held that they were liable both for inducing a breach of the existing contracts and also for conspiring to prevent others from entering into contracts with the plaintiff.

A similar case came before the house of lords in 1897: *Allen v. Flood* [1898]. L. R. App. Cas. 1. In that case the plaintiffs were employed by the job at work upon a ship, but were subject to be discharged at the will of their employer. Allen, the defendant, representing a boilermakers' society, called upon the agents of their employer, and stated to them, that, unless the plaintiffs were discharged, the members of the boiler-makers' society, about forty in number, then at work on the ship, would be "called out" or "knock off" work on that day. Thereupon their employer discharged the plaintiffs; and they brought suit against the defendant, alleging in effect that he had unlawfully and maliciously caused their discharge. It was held by the court—four of the nine law-lords dissenting—that, since the employer had a right to discharge the plaintiffs and since the discharge was lawful, the defendant was not liable for having procured it, although as found by the jury he acted from a malicious motive. In the numerous opinions which were given in the case, the previous cases of *Lumley v. Gye*, 2 El. & B. 216, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, were discussed. After that decision it became a question, whether their authority had not been shaken, if not overturned thereby. But in 1901 the important case of *Quinn v. Leathem*, [1901] App. Cas. 495, arose, and it was there held that

"A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable." All the judges concurred in the judgment and the effect of the decision is to distinguish *Allen v. Flood*, and to hold the cases of *Lumley v. Gye*, 2 El. & B. 216, *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, and *Temperton v. Russel* (1893), L. R. 1 Q. B. Div. 715, were correctly decided.

In *Lumley v. Gye*, 2 El. & B. 216, the contract was one for personal services, and the insistence of Mr. Justice Coleridge was that it was not actionable to induce the breach of such a contract except where it created the relation of master and servant in the technical and restricted sense of those terms. The majority, however, held that the rule applied to any contract for service. The decision therefore goes no further than to hold that a cause of action lies for procuring the breach of any such contract. It may be doubted whether the contract the breach of which was ⁴⁵⁰ induced in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, should be classed as a contract for service. However that may be, the contract in *Temperton v. Russell* (1893), L. R. 1 Q. B. Div. 715, was for the delivery of material, and it does not come under that class.

It seems to us, therefore, that the law is now settled in England that it is an actionable wrong knowingly to induce one to break his contract with another to the damage of the latter, and that it is also wrongful and actionable for two or more to accomplish such end by conspiring with each other.

Numerous decisions affirming the same rule may be found in the courts of this country. We will briefly refer to some of the more prominent cases.

In *Angle v. Chicago etc. Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. Rep. 240, the contract under consideration was for the construction of a railroad; and it was held that, "If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." The opinion of Mr. Justice Brewer reviews *Lumley v. Gye*, 2 El. & B. 216, and other English cases which had been decided at that time, and was concurred in by all the judges save one, who dissented upon grounds not in conflict with the decision upon that point.

The case of *Walker v. Cronin*, 107 Mass. 555, holds that an action lies against one who procures the violation of his con-

tract of service by the servant, and that the rule is not confined to contracts for menial service. It was argued by the dissenting judge in *Lumley v. Gye*, 2 El. & B. 216, that the rule applied only in case of servants in the strict sense of that term, and that the action in such a case was given by a statute of 23 Edward III, and was "limited by it." Since the Massachusetts court holds that the action is not confined to contracts such as are referred to in that statute, and since we see no sufficient reason for making a distinction in such a case between contracts of service and other contracts, it seems to us that that court would hold that it would be actionable knowingly to procure the violation of any contract to the damage of one of the contracting parties.

In *Jones v. Stanly*, 76 N. C. 355, it is distinctly held that the rule applies to any contract.

On the other hand, it is decided by the supreme court of California that "maliciously inducing another to break a contract with a third person, will not create a liability to the latter, when it is done without threats, violence, falsehood, deception or benefit to the person inducing the breach": *Boyson v. Thorn*. 98 Cal. 578, 33 Pac. 492. The same principle was applied in *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60. That was a case strikingly like *Lumley v. Gye*, 2 El. & B. 216. The plaintiffs had entered into a contract with the manager of the distinguished actress Mary Anderson to perform on certain nights at their theater, and afterward the defendant procured a breach of the contract with plaintiffs and procured the actress to appear at his, a rival house. It was held that these facts constituted no cause of action.

⁴⁵¹ There are many other cases of a somewhat similar nature, but in most of them there was some element of fraud, threats, intimidation or conspiracy, and for that reason they are probably not direct authority upon the question before us.

We are of opinion that the rule that, where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing the breach for any damages resulting to him by such breach, is supported by a decided preponderance of authority and by the better principle. The principle is well stated by Lord Justice Lopes in his opinion in the case of *Temperton v. Russell* (1893), L. R. 1 Q. B. Div. 715, in the following extract: "The case which I think must govern our decision as to the first head of claim is *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, which I understand to lay down the broad principle that a person who in-

duces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation."

It seems to us that where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property either real or personal; and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he has a remedy against the party who has broken the contract. In the first place such remedy is ineffectual unless he who has made the breach has property or credits which may be applied by process of law to the satisfaction of a judgment that may be obtained against him. In the second, it sometimes occurs that, in case of joint tort-feasors, the liability of the one may be secondary to that of the other, and that, in the event of a recovery against one, he may have a claim for indemnity against the party jointly liable. For example, a master may be sued for the wrong of his servant while acting in performance of the master's business and within the scope of his employment, although the wrongful act may have been done, not only without any participation on part of the master, but even against his express orders. We understand the rule in such a case to be that though either or both may be held liable to the injured party, as between the master and servant the latter is primarily responsible.

We have said that the point has never been decided in this court. But in *Delz v. Winfrey*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, the plaintiff, a butcher, alleged in his petition that the defendants, a firm dealing in livestock, had not only refused to sell to him, but had combined with other such dealers and had induced them also to refuse to deal with him. It was held that the defendants had the absolute right to deal or not with the plaintiff ⁴⁵² as they saw fit, but that it was an actionable wrong to induce others to do so. Clearly the substance of the wrong in that case was the inducement of third parties not to deal with plaintiff, which was a mere obstruction of his right to buy from dealers without officious interference on

part of others. If it be actionable for one to intermeddle in another's affairs and thereby prevent him from making contracts, to the damage of his business, for a stronger reason it is actionable to induce the breach of a contract already made.

Our conclusion upon this branch of the case is that the court erred in sustaining the demurrer to the petition. Just here we will add, however, that it is not quite clear to us whether the allegations in the petition should be construed as charging defendant Yarrington as being a party to the agreement to induce Harwood to break his contract. But this is unimportant, since, as we have seen, he was responsible for Harwood's engaging again in the milling agency business, whether he induced him to do so or not.

We are also of the opinion that the court erred in instructing a verdict for the defendant Harwood. The charge is as follows: "In this case there is no evidence tending to show what part of the decrease in the business of Raymond & Brother below that done by Harwood & Yarrington was caused by the competition of Harwood, if any, in violation of his contract, what part was due to competition of Harwood under his written permission, what part was due to other competition than houses represented by Harwood, or what part was due to lack of experience in the business on the part of Raymond & Brother, as compared with Harwood & Yarrington. . . . The jury will therefore return a verdict for the defendant." In view of the fact that the case will be remanded for a new trial, we must refrain from discussing the testimony. We may say, however, that the evidence does not show how much, if any, the plaintiff was damaged; and it may be that if, under the testimony and a proper instruction, the jury had given only nominal damages, the court should not have disturbed the verdict. From the nature of the case, it is impossible to show the damages with accuracy, and to require accuracy in such a case would be to deny a remedy for a wrong. In *Welsh v. Morris*, previously cited, a judgment for substantial damages was sustained upon testimony quite as unsatisfactory, to say the least of it, as that introduced in the present case.

If Harwood violated his contract the plaintiff was entitled to recover, at all events, nominal damages: *Davis v. Texas etc. Ry. Co.*, 91 Tex. 505, 44 S. W. 822.

The judgment of the district court and that of the court of civil appeals are reversed and the cause remanded for a new trial.

One of the Questions Involved in the principal case was presented for consideration and decision in *Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453, 73 S. W. 800. The plaintiff, a corporation, engaged in the business of selling stoves by wholesale, employed one Nash as a traveling salesman under an agreement with him that he was to serve it exclusively, but the defendant, another corporation engaged in a like business and knowing of Nash's contract, induced him to violate it by abandoning the service of the plaintiff and entering that of the defendant, whereby the defendant alleged that it lost trade and was damaged many thousand dollars. A demurrer to the complaint stating these facts was sustained and a judgment entered for the defendant, but it was reversed on authority of the principal case.

ACTIONS FOR INDUCING ONE TO BREAK HIS CONTRACT.

I. Scope of Note.

II. When Action Will Lie.

- a. Malice Gist of Action.
- b. Person Induced to Violate Contract may Recover.
- c. Proof of Specific Damage.
- d. Malicious Motives Alone Held not Sufficient to Sustain Action.

I. Scope of Note.

In this note we shall not attempt to treat of those cases which involve the relation of master and servant. The liability of a person who interferes between employer and employé, and by inducement either occasions the latter to be discharged or to voluntarily leave his employment, thus causing a breach of contract, has been treated in the note to *Webber v. Barry*, 11 Am. St. Rep. 474-478, where the general rule is stated to be that one who knowingly and willfully entices away the servant of another, inducing him to violate his contract with his master, and thereby depriving the latter of the services of a person actually in his service, or bound by contract to render him service, is liable to the master for the actual loss which he sustains therefrom. Although this rule, in the main, has been applied where the relation of master and servant existed, it applies with equal force to all other cases where the breach of a contract not involving such relations, is induced by the malicious and unlawful intermeddling of a third person. "It is familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description": *Walker v. Cronin*, 107 Mass. 567.

"It was decided in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service": *Jones v. Stanby*, 76 N. C. 356.

II. Where Action Will Lie.

a. **Malice Gist of Action.**—As a general rule it may be stated that if one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of the latter, it is actionable: *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591. If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer: *Angle v. Chicago etc. Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. Rep. 240. While "merely to persuade a person to break his contract may not be wrongful in law or fact, still if the persuasion be used for the indirect purpose of injuring the plaintiff, or benefiting the defendant, at the expense of the plaintiff, it is a malicious act, which, in law and in fact, is a wrongful act, and therefore an actionable act, if injury issued from it": *Chipley v. Atkinson*, 23 Fla. 211, 11 Am. St. Rep. 367, 1 South. 934; *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333. In order to recover in such cases express malice must be shown, because a person who, on being asked gives honest advice and bona fide counsel to another which induces him to break his contract with a third person, is not liable for damages at the suit of such third person, although the latter has sustained loss by the breach of the contract. And this is true where several persons have combined to give the advice if they have no malicious intention to injure such third person: *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903), 1 K. B. 118, 87 L. T. 232. An intentional and malicious interference with the legal right of another, such as procuring the breach of a contract with him, is an actionable wrong, unless there is sufficient justification for the interference and what will justify such interference cannot be satisfactorily defined, and this question must be left to the determination of the court in each case. In considering the circumstances surrounding the case regard must be had to the nature of the contract broken, the position of the parties to it, the grounds of the breach, the means employed, the relation of the person who procures the breach to the person who breaks the contract and the object in procuring such breach. If an intentional interference is shown with the contractual rights of other persons there is a legal presumption of malice on the party inducing the breach of the contract; but he may rebut the presumption by proof

of facts raising a duty on his part to advise a breach of contract, and the person injured by the breach may neutralize such proof, by showing express malice on the part of the adviser: *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903), 2 K. B. 545, 87 L. T. 493.

Malice must be shown to exist in order to maintain the action as an unwarranted interference between the contracting parties does not create a cause of action unless actuated by motives of fraud or malice: *McCann v. Wolff*, 28 Mo. App. 447. Since the decision in *Lumley v. Gye*, 2 El. & B. 216, it may be regarded as established law in England and in this country that an action will lie against a person who maliciously persuades another person to break his contract with the plaintiff to the injury of the latter: *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903), 2 K. B. 545; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Walker v. Cronin*, 107 Mass. 555, 567; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 867; *Lally v. Cantwell*, 30 Mo. App. 524, 528; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanby*, 76 N. C. 355; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591.

An action lies against a third person for wrongfully procuring a person to break his contract with the plaintiff to the latter's injury by the employment of unlawful and improper means. This rule applies where the employer breaks his contract, as well as where it is broken by the employe, and is not in fact, confined to contracts of employment: *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96. The gravamen of the civil action for damages for inducing the breach of the contract is malice: *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485. This rule may be illustrated by a number of cases. Thus an action lies in favor of a landlord, against any person who so wrongfully and maliciously disturbs his tenants, that they abandon his premises and the landlord thereby loses his rent: *Aldridge v. Stuyvesant*, 1 Hall (N. Y.), 235. Or if persons are engaged to work a farm, under written contract whereby they are to receive part of the crop for their services, the owner of the farm can maintain an action against a third person for maliciously inducing them to break their contract, and it is no defense that such contract was unreasonable: *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780. In *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869, it appeared that plaintiff entered into a contract to design and construct a machine which should produce certain results, but which the purchaser should have the right to reject if not satisfactory to him. A corporation was thereafter formed to continue the business of the purchaser, and the defendant became a stockholder therein. Maliciously and deceitfully defendant induced such purchaser to reject the machine, which he would otherwise have accepted and it was held that the defendant was liable for the resulting damage to the plaintiff. A combination in business wantonly and maliciously

formed to induce a person to violate his contract with a third person, to the injury of the latter, is unlawful and actionable: *West Virginia etc. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591. In *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, it appeared that one Stebbins agreed verbally to sell to Rice a large quantity of cheese. The contract was not enforceable because within the statute of frauds. Manley induced Stebbins to believe that Rice did not want the cheese, and himself purchased it from Stebbins, who would have otherwise delivered it to Rice as agreed. It was held that Manley was liable to Rice in damages for his malicious and fraudulent interference with the contract, notwithstanding Stebbins was not in any wise liable to Rice. To the same effect is *Lucke v. Clothing Cutters*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505. Again, in *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623, the contract was void under the statute of frauds, yet the court held that a recovery could be had against a third person, who maliciously interfered with the contract for his own gain or profit. False statements, made by a person in regard to articles made and manufactured by another, for the purpose of preventing sales by them and as an inducement to break a contract entered into, and which do in fact prevent such sales and thus injure the manufacturer in his business create a cause of action: *Snow v. Judson*, 38 Barb. 210. In *Morgan v. Andrews*, 107 Mich. 39, 64 N. W. 869, it was said that "of course this rule would not prevail where the party sought to be charged in damages was acting in the lawful exercise of some distinct right, for the *quo animo* constitutes a large part of the gist of the action." The foundation of the action is malice resulting in damage to the plaintiff, by invading some legal right. Hence, if a person induces a testator by means of false and fraudulent representations to revoke his will devising his real estate to a third person, the latter cannot maintain an action for damages because by such inducement he is deprived merely of an expected gratuity, and none of his legal rights are thereby interfered with: *Hutchins v. Hutchins*, 7 Hill, 104.

b. **Person Induced to Violate Contract may Recover.**—Although a person who violates a contract is personally liable, yet if he is induced to do so by the acts and persuasion of another who intended thereby to injure the other contracting party or to coerce him to adopt a line of business against his will and judgment, he also has a right to recover against the persons thus inducing him to break his contract: *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524.

c. **Proof of Specific Damage.**—In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff proof of specific damage need not be given. It is sufficient if facts are proven from which it may properly be inferred that some damage must result to the plaintiff from the defendant's

wrongful acts: *Exchange Tel. Co. v. Gregory* (1896), L. R. 1 Q. B. Div. 147. In this case it was said: "To say that the damage must be such as can be measured, that you must show how much the wrongful act complained of would injure the person against whom it was done, is no answer. A man who does such a wrongful act as the defendant has done lays himself open to be told by the tribunal before whom he appears: 'You have damaged the plaintiff. You have done a contemptible and fraudulent act against him, and have invaded his common-law right, and therefore you must have damaged him.' In such case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large": *Exchange Tel. Co. v. Gregory* (1896), L. R. 1 Q. B. Div. 153.

d. Malicious Motives Alone Held not Sufficient to Sustain Action.—There is a line of cases which in effect repudiate the doctrine laid down in the cases heretofore cited by announcing the rule that merely to induce or procure a free contracting party to break his contract, whether done maliciously or not, to the damage of the other contracting party, does not give a right of action against the party holding out the inducement: *Glencoe Land etc. Co. v. Hudson Brothers Co.*, 138 Mo. 439, 60 Am. St. Rep. 560, 40 S. W. 93. This rule is based on the absurd proposition that the act of a person in inducing another to break his contract with a third person to the injury of the latter, does not constitute a legal wrong, and that as the act does not constitute a legal wrong, it cannot be actionable because it is done with a bad or malicious motive or intent, and that although malicious motives may make a bad act worse, they cannot make that a wrong which in its own essence is lawful: *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492; *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57; *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60. Hence this line of cases holds that an action will not lie against one who from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff to the latter's injury, with whom he does not stand in the relation of master and servant or any other personal relation: *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492; *Glencoe Land etc. Co. v. Hudson Brothers etc. Co.*, 138 Mo. 439, 60 Am. St. Rep. 560; 40 S. W. 93. The Kentucky courts hold that merely inducing a person without exercising coercion or deception to break his contract with the plaintiff is not an actionable wrong, and the mere fact that the defendant was actuated by malicious motives and by a purpose of injuring the plaintiff does not so change the character of what he has done, as to convert it into a tort for which damages may be recovered: *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57; *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60. It has also been held that if a person has agreed to sell property to another, a third person may, at any time before the title has

passed, induce the vendor not to let the person with whom he has contracted have the property, but instead to sell it to himself, provided he is guilty of no fraud or misrepresentation, and the person holding out the inducement and thus obtaining the property is not liable in any way to the proposed vendee whose contract with the vendor is thus broken: *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559. In *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 49 Am. Rep. 666, the plaintiff, a merchant, had a large and profitable trade with the defendant's employes. Defendant posted a notice to the effect that if any of his employes, after that date, traded with plaintiff, they would be discharged. This it was alleged was done maliciously, whereby plaintiff was damaged. The court held that the act done was not unlawful, nor done in an unlawful manner, and though exercised from wicked and malicious motives, was not actionable, and the fact of whether or not a contract existed between the merchant and the employes could make no difference nor could it affect the principle involved.

WILSON v. ELLIOTT.

[96 Tex. 472, 73 S. W. 946.]

PARENT AND CHILD—Foreign Decree of Divorce Affecting the Custody of a Child.—A decree of divorce in another state or territory in which the custody of the child is awarded to the father is conclusive as to his right and fitness for such custody at that time, and in a proceeding by habeas corpus for the possession of the child evidence will not be heard to show that he was less fit for such custody than the mother at the time of the entry of the decree. It is not, however, a bar to a subsequent proceeding to modify it upon proof that the situation and character of the parties have so changed as to render it to the interest of the child that it be committed to the care of its mother. (p. 930.)

Proceedings by habeas corpus whereby a father of a girl eleven years of age sought to obtain possession of her from her mother. The parents had been divorced by a district court of New Mexico, which by its decree awarded the custody of the child to the father, but provided that she should be permitted to visit her mother during the month of July of each year in the territory of New Mexico, but should not be removed therefrom. The mother subsequently married and brought her daughter to Texas, in violation of the decree. The trial judge held that the decree of divorce was conclusive upon the parties upon the question of their respective fitness for the custody of the child at the time it was rendered, and refused to consider any evidence of any fact occurring prior to such decree. The court of civil appeals of the fourth district was of the opinion "that the court

erred in giving effect to the New Mexico decrees, and in refusing to consider much of the evidence," and certified questions to the supreme court for its opinion.

S. P. Weisiger and Turney & Burgess, for the appellant.

Clark, Fall, Hawkins & Franklin, for the appellee.

476 GAINES, C. J. The court of civil appeals for the fourth supreme judicial district have certified to us the following statement and question:

"On May 4, 1899, the appellant and appellee were divorced by decree of the district court of New Mexico, where they resided. They had a daughter who is now eleven years of age. The New Mexico court had jurisdiction of the subject matter and of the parties, including the child. The final decree in that proceeding adjudicated that the father (appellee here) should have the custody of the child with the provisions 'that the child should be permitted to visit its mother once a year for the period of one month during the month of July, that said visits shall be made within the territory of New Mexico, and the said child shall not be removed from said territory by her mother.'

"The mother remarried in New Mexico, and with her husband removed to El Paso, Texas, she bringing with her the child in disregard of said decree.

"This is a habeas corpus proceeding, in the district court of El Paso County, by the father to obtain possession of the child, and the proceeding took place in vacation.

"At the hearing the parties introduced testimony concerning the character, conduct and fitness of each other prior to and since the date of the territorial decree, but the judge, as shown by his certificate to the statement of facts, 'did not consider as evidence on the trial any evidence of any fact that occurred prior to that decree, excepting the proceeding in said New Mexico court as set out in exhibit "A" hereto attached.' The exhibit thus referred to consists only of the certified pleading and decree of the New Mexico court. The testimony introduced and which the judge certifies he did not consider, affected the fitness of the parents respectively and was conflicting. The certificate to the statement of facts and also the judge's conclusions of law show that in disposing of the issues involved herein, he treated the New Mexico decree as conclusive of all matters at its date, and that he could and did consider only evidence of what has occurred since that date. The case is pending in this

court on rehearing, and we therefore accompany this with copy of this court's opinion and copy of the motion for rehearing.

"Question: Was the district judge correct in the effect given by him to the New Mexico decree?"

In treating of the effect of an order of a court of another state or country, awarding the custody of children in a decree of divorce, Mr. Bishop says: "Under our national constitution, this order is plainly a record to which, if the court has jurisdiction, the same faith and effect permitted it in the state of its rendition must be given in every other state. And the true rule in the state of its rendition is that it is *res judicata*, concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status, rightfully, like marriage, ⁴⁷⁷ regulated by any state in which the parties are domiciled, does the order in one state operate as an estoppel of all future inquiry in the courts of another state wherein the child has acquired a domicile": 2 Bishop on Marriage and Divorce, 2d ed., 1189. We think that this is a correct exposition of the law and that it is sustained by the following authorities cited by the author: *Dubois v. Johnson*, 96 Ind. 6; *Umlauf v. Umlauf*, 27 Ill. App. 375; *Jennings v. Jennings*, 56 Iowa, 288, 9 N. W. 222; *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334; *White v. White*, 75 Iowa, 218, 39 N. W. 277; *Sherwood v. Sherwood*, 56 Iowa, 608, 10 N. W. 98; *Teter v. Teter*, 88 Ind. 494; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 302; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1318. It follows that, in our opinion, the status of the father as a proper person to have the custody of the child at the time the decree of the territorial court of New Mexico was rendered was fixed by that decree, and that the judgment that he was entitled to such custody is *res adjudicata*; but that the order is not a bar to a subsequent proceeding to modify it upon proof that the situation and character of the respective parties has so changed as to render it to the interest of the infant that it be committed to the care of the mother. In the case of *Dubois v. Johnson*, 96 Ind. 6, previously cited, the court after quoting from the opinion in *Williams v. Williams*, 13 Ind. 523, says: "The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen subsequent to the decree." The question upon the first trial in a case of a character of this is,

Which is the more suitable party to be intrusted with the care of the child at that time? The question in the subsequent proceeding is, Which is the more suitable at the time of that trial? Since in determining the second question the first cannot be agitated, it follows, that evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct, which was developed since the original decree. As just intimated, we think, however, where testimony upon the second trial tends to show misconduct on the part of the one to whom the custody has been previously committed, and that he or she, since the first, has become a person not suitable for so important a charge, the rule of *res adjudicata* would not preclude the introduction of evidence of conduct previous to the first decree—provided it tended to corroborate the evidence of subsequent conduct of a like nature. For example, upon the second trial evidence might be introduced tending to show that the party had, since the first, become a spendthrift, had wasted his subsistence, and was incapable of maintaining and educating the child as it should be maintained and educated. In such a case we see no reason why improvident conduct previous to the first decree may not be offered in evidence. Or if upon the second trial evidence be introduced tending to show that since the first the party has become an habitual drunkard, we think that it might be shown in corroboration that previous to the first trial he was accustomed to use intoxicating liquors to excess.

The certificate of the court of civil appeals does not set forth the ⁴⁷⁸ evidence which the judge had before him, and we get an unsatisfactory idea of it from the briefs to which we are referred. Without knowing all the evidence in the case bearing upon the issue presented, we cannot give a direct answer to the question; but trust the foregoing may be sufficient to guide the court in the decision of the point.

Foreign Decrees of Divorce are discussed in the monographic notes to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182-184; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 553-555. That a decree of divorce is within the full faith and credit clause of the federal constitution, see *Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791, 37 S. E. 212.

The Custody of Minor Children, so far as concerns the respective rights of the parents thereto, is considered in *Neville v. Reed*, 134 Ala. 317, 32 South. 659, 92 Am. St. Rep. 35, and cases cited in the cross-reference note thereto. In ascertaining and enforcing the custody of an infant, the court will not establish a permanent custody, but one intended to continue until a change of circumstances shall,

in respect to the child's welfare, require a change: *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; *Everitt v. Everitt*, 29 Ind. App. 508, 94 Am. St. Rep. 276, 64 N. E. 892. Some statutes provide for subsequent changes in decrees of divorce in respect to the disposal of the children: *Karren v. Karren*, 25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465.

SCOTTISH-AMERICAN MORTGAGE COMPANY, LIMITED, v. DAVIS.

[96 Tex. 504, 74 S. W. 17.]

CONTRACTS—Acceptance by Mail—Right to Withdraw.—Where a proposal has not been made by mail, its acceptance, though mailed by the proposer, remains within the control of the acceptor until delivery, and he may, by preventing the delivery of the letter, avoid the consummation of the contract. (p. 934.)

Gano, Gano & Gano, for the plaintiff in error.

Matlock, Miller & Dycus, for the defendant in error.

506 BROWN, A. J. W. S. Davis sued the Scottish-American Mortgage Company, Limited, and Brown Brothers to recover commissions alleged to be due to him from them for procuring a purchase for certain lands. Brown Brothers were the agents of the mortgage company and represented it in the transaction. The mortgage company and Brown Brothers pleaded over against J. R. Coutts, the alleged purchaser, but he was dismissed from the case on a plea of his privilege to be sued in Parker county. The following are the findings of fact by the court of civil appeals:

"The evidence discloses that Brown Bros. resided in Austin, Texas. Davis resided in Fort Worth, Texas, and the communication between them was through the mails. Coutts resided in Weatherford and Davis first got in communication with him through Honorable I. W. Stephens, who stated to Davis that Coutts would like to purchase the land. After various communications between the parties, Brown Bros. submitted, through Davis, to Coutts a proposition to sell. This Coutts declined. Davis then went to Weatherford, saw Coutts, and secured from him a written proposition to purchase. This was sent by Davis to Brown Bros., and on January 23, 1900, Brown Bros. returned the same to Davis with this interlineation: 'Subject to letter from Brown Bros. to W. S. **507** Davis & Co., dated the

20th of January, 1900.' The letter of January 20, 1900, mentioned related to a tax title on twelve sections of said land and stated, 'You will recollect that there is an old absolutely invalid tax title on twelve sections. We could clear off this title by suit easily, but prefer that the purchaser do it and would pay half of the costs of the suit.' The proposition so interlined by Brown Bros. was sent to Coutts by Davis. After receiving same Coutts, on the morning of January 26, 1900, met Judge Stephens in Weatherford on his way to take the train for Fort Worth, and told him (Stephens) that he could tell Davis that he (Coutts) had decided to take the land. Stephens said for him to confer direct with Brown Bros., which he assented to. When Judge Stephens reached Fort Worth he told Davis of the conversation he had with Coutts. Davis on the same day wired Brown Bros. that Coutts had accepted and followed same with a letter. On that same day Coutts mailed to Brown Bros. the following letter, to wit:

" 'January 26, 1900.

" 'Messrs. Brown Bros., Austin, Texas.

" 'Gentlemen: You are hereby notified that I accept the interlineation above the last line of first page of preliminary contract and will take the land as indicated by said agreement.

" 'I think, however, that you people ought to pay the whole cost of clearing title, but will not let that prevent the trade. You will please advise me what you think is best plan of procedure in clearing title. Shall we sue for same or act on the defense and wait for adverse claimant to institute proceedings?

" 'The abstract received, which is too large for immediate examination. I accept relying on your statement and that it will show up as represented.

" 'Yours truly,

" 'J. R. COUTTS.'

"This letter never reached Brown Bros., it being intercepted the next day by telegram sent by one Holland at the instance of Coutts to the postmaster at Austin, who returned it to Coutts, and on that day—27th—Coutts telegraphed Brown Bros. that he objected to the land on account of its shape and declared the trade off. In the letter from Brown Bros. to Davis of January 22d, in which Coutts' proposal was returned interlined by Brown Bros., they said: 'Your commission, of course, will be payable only in the event of the sale going through according to the contract.' This is the first time Brown Bros. said anything to Davis as to when the commissions were payable."

A judgment was entered in favor of Davis against the mortgage company and Brown Bros. for three thousand three hundred and eighty-two dollars, which was affirmed against the mortgage company and reversed and rendered in favor of Brown Bros. by the court of civil appeals.

The controlling question in this case is, Was there at any time a contract between the mortgage company and Coutts which could have been ⁵⁰⁸ enforced by either party? The first proposition in writing that passed between the parties was sent by Brown Bros., as agents of the mortgage company, to Davis to be submitted to Coutts, who rejected it and returned the proposition in a modified form to Brown Bros. for their acceptance. Brown Bros. did not accept the proposition as modified by Coutts, but in turn added other terms, and returned it to Davis to be again submitted to Coutts, who took the matter under advisement, which left the proposition open for rejection by either party. Up to this time their minds had not met in agreement. Coutts, after consideration of the proposed contract, told his friend, Judge Stephens, that he would accept it, and authorized Stephens to state that fact to Davis in Fort Worth, but upon the suggestion of Stephens, Coutts concluded to communicate through the mail with Brown Bros. and to close the trade with them. Judge Stephens stated the conversation between himself and Coutts to Davis at Fort Worth, telling him that Coutts would communicate directly with Brown Bros. and "close the contract with them." These facts did not constitute a binding obligation on Coutts; he might withhold his intended acceptance. When Coutts put his acceptance of the proposition in the postoffice to be delivered to Brown Bros. at Austin it was still subject to his control, and might be recalled at any time before actual delivery, unless the facts bring it within the rule of law hereafter stated.

The authorities are well-nigh unanimous in asserting that, when a party submits to another through the mail a proposition of purchase or sale, the receiver of the proposition has the right within a reasonable time and before it is withdrawn to accept by a writing deposited in the postoffice duly stamped, ready for carriage and delivery, and such an acceptance binds the proposer of the contract from the time the deposit is made in the postoffice, whether it be delivered or not: *Blake v. Hamburg etc. Ins. Co.*, 67 Tex. 163, 60 Am. Rep. 15, 2 S. W. 368; *Bryant v. Booze*, 55 Ga. 445; *Levy v. Cohen*, 4 Ga. 13; *Moore v. Pierson*, 6 Iowa, 292, 71 Am. Dec. 409; *Vassar v. Camp*, 11 N. Y. 441;

Hunt v. Higman, 70 Iowa, 406, 30 N. W. 769; Hallock v. Commercial Ins. Co., 26 N. J. L. 280; Dunlop v. Higgins, 1 H. L. Cas. 397. Any number of authorities to the same effect might be added.

The facts of this case do not bring it within the rule above laid down, because there had been no proposition submitted by Brown Bros. on behalf of the mortgage company to Coutts through the mail, hence there was no implied authority for Coutts to accept by mail except by actual delivery of his acceptance. When Coutts deposited his letter in the postoffice it was subject to his control until delivered to the party addressed, and he had a perfect right to withdraw his acceptance and abandon the contract, because it did not bind the mortgage company until delivered and could not bind Coutts alone—it must be mutual. There never was a time when Coutts was legally bound to take the land. Davis never did present Coutts “able, ready and willing” to accept a deed for the land from the mortgage company, nor did the mortgage company ever decline to carry out the proposed contract; on the contrary, after Brown Bros. received the telegram withdrawing the proposition they made an earnest ⁵⁰⁰ and persistent effort to induce Coutts to carry out the trade but he refused. Neither Brown Bros., Davis, nor the mortgage company ever knew that Coutts had mailed a written acceptance until after he had repeatedly rejected all propositions from Brown Bros. to carry it out and suit had been commenced by Davis to recover his commissions.

There is no evidence to support the judgment in favor of Davis against the mortgage company, and, from the undisputed facts, it is evident that no right of action can be established upon another trial in favor of Davis. It is therefore ordered that the judgment of the court of civil appeals as between Davis and the mortgage company be reversed, and that judgment be here entered in favor of the mortgage company that Davis take nothing by his suit and for all costs. The judgment of the court of civil appeals as to all the other parties is affirmed.

Reversed and rendered.

A Contract made and accepted by letter is complete the moment the letter of acceptance is deposited in the postoffice: Hartford etc. Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629; note to Maclay v. Harvey, 32 Am. Rep. 40. See, too, Brauer v. Shaw, 168 Mass. 198, 60 Am. St. Rep. 387, 46 N. E. 617.

WESTERN UNION TELEGRAPH COMPANY v. WALLER.

[96 Tex. 589, 74 S. W. 751.]

TELEGRAPH CORPORATIONS—Damages for Mental Anguish, When not Admissible.—In an action against a telegraph corporation for the negligent failure to deliver a message summoning the plaintiff to the bedside of his mother then fatally ill, it is not permissible to prove that she frequently inquired for her son and kept calling his name and asked why he did not come to her. (pp. 936, 937.)

TELEGRAPH CORPORATIONS—Conflict of Laws.—The fact that damages for mental anguish are not recoverable in a state or country where a telegraph message should have been delivered will not prevent their recovery in an action in the state whence the message was sent, if recoverable by its laws. (p. 938.)

George H. Fearons, C. F. Huff and Matthis & Barwise, for the plaintiff in error.

Montgomery & Hughes, for the defendant in error.

592 WILLIAMS, A. J. Defendant in error recovered in the district court the judgment which was affirmed by the court of civil appeals against plaintiff in error for damages for negligent delay in delivering a telegraphic message sent from Jacksboro, Texas, to Duncan, Indian Territory, summoning defendant in error to the bedside of his mother, who was dangerously ill at the former place. The mother died and plaintiff claimed that, in consequence of delay in delivery of the message, he was unable to reach her before her death and suffered the mental anguish for which he recovered. Evidence was admitted in behalf of plaintiff in the court below that, before her death, his mother "made inquiries and requests with reference to her son often and frequently, and kept calling, 'Harvey, why don't you come to me?'" Objection was properly made by defendant that the evidence was "hearsay, incompetent for any purpose, and was offered for the purpose of prejudicing the defendant's case before the jury, and was reasonably calculated to inflame the minds of the jury against defendant, and that such testimony was irrelevant."

We are of the opinion that the testimony was irrelevant and was calculated to excite unduly the sympathies of the jury, and to cause them to lose sight of the true inquiry, which was the effect produced upon plaintiff, himself, by defendant's negligence. The direct and immediate tendency of the evidence was to show a state of mind of the mother, existing under circum-

stances and with incidents strongly appealing to the feelings of those trying the case. The state of mind and those incidents were, themselves, not involved in the issue being tried. They had, as we have said, a strong tendency to improperly influence the decision of the real issues; and they should not, therefore, have been allowed to come into the case, unless, circumstantially, they tended in an appreciable degree to establish some fact which was at issue. It is urged that the demeanor of the mother tended to show her feelings for the son, and that this tended inferentially to prove the existence of a corresponding feeling on the part of the son for the mother, and the case of *Western Union Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701, is relied on to sustain the contention. In that case evidence was admitted that plaintiff was "his mother's favorite son" over the objection that it indicated what the mother's feelings were, which was not the issue. After remarking that the objection was not made at the proper time Judge Henry adds: "But if it had been, we do not think it should have been excluded upon the objection made to it. While juries in the absence of any evidence on the subject may act upon their own knowledge of the affection subsisting between a mother and son, still the admission of evidence upon the subject may be proper, and we cannot say that proof of a special regard felt ⁵⁹³ and shown by a mother for one of her children may not be properly considered by the jury, in connection with other circumstances, in estimating the feelings of the child for the parent." One difference between that case and this is that the evidence there offered was direct proof of the feelings of the parties toward each other, the form of the statement being such as naturally expressed the existence of a reciprocal feeling between mother and son; while here, inquiries and exclamations of a dying mother are offered, from which is to be first drawn an inference of her feelings for her son, and then, from that, another inference of the feelings of her son for her. For such a purpose the evidence was too remote; and in addition to the objection arising from the slight and remote character of the inference, a deathbed scene is reproduced of such peculiar pathos that its influence would be almost sure, under a ruling admitting it as proper subject for consideration, to usurp the attention of the jury to the exclusion of those considerations which alone should control their action. It is to be observed of the *Lydon* case, and other decisions of this court, that properly understood, they only admit evidence to prove the existence of those feelings

which the jury might, from their knowledge of human nature, presume to have existed, in the absence of proof, and, perhaps, the extent to which they existed in the particular case (*Western Union Tel. Co. v. Adams*, 75 Tex. 535, 16 Am. St. Rep. 920, 12 S. W. 857), and the evidence in all of the cases was such as tended proximately to show the existence of the feeling, and was not, like that here relied on, mischievous in itself and relating only very remotely to the question under investigation. It is very probably true that a repetition to plaintiff of these expressions by his mother of her yearning for his presence would add poignancy to the anguish which his failure to see her before her death occasioned; but there would be no end to an inquiry into the effects of such an action and reaction of mind upon mind; and, accordingly, the decision of this court in *Western Union Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438, wisely confines the recovery to damages for such injury to such feelings as ordinarily arise from the failure to deliver such a message, and excluded evidence of aggravation of the character of that here in question. The evidence, in our opinion, should have been excluded. The contention that, as damages for mental anguish are not recoverable in the Indian Territory, where the message was to be delivered, they cannot be recovered in this state, was decided adversely to plaintiff in error in *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427, in which this court refused a writ of error.

Reversed and remanded.

The Sender of a Telegraph Message from one state to a point in another may recover in the latter state for mental anguish suffered through negligent delay in the delivery of the message, when such recovery is authorized by the statutes of that state, although in the state from which the message was sent no recovery can be had for mental anguish: *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, and see the monographic note thereto on conflict of laws as to the measure of damages. As to the right in general to recover against telegraph companies for mental suffering, see *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, and cases cited in the cross-reference note thereto; monographic notes to *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875; *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. GARREN.

[96 Tex. 605, 74 S. W. 897.]

MASTER AND SERVANT—Promise to Repair, When not Imputable to the Master.—A remark made by the engineer to a brakeman, on discovering a defect in the step of a locomotive, "I'll have it fixed," does not amount to a promise by the master to repair, where the engineer has no power to employ or discharge brakemen or other servants. (p. 942.)

MASTER AND SERVANT—Recovery by Servant for Injuries Received from Defects of Which He had had Knowledge.—Although a servant may at one time have known of the existence of a defect, he may not know of it at the time of undertaking to use an appliance. Circumstances may justify him in believing that defective conditions have been remedied, and he may recover for injuries received from the use of the defective appliance, if he believes it had been repaired, and the circumstances justify the belief. (p. 943.)

JURY TRIAL—Where Conflicting Theories are Included in a Charge, one of which is erroneous as a matter of law, the judgment must be reversed, though the other was correct, if it cannot be known, but the jury acted upon the erroneous theory. (p. 943.)

EVIDENCE—Statement of a Party to the Suit, When Admissible to Corroborate His Testimony.—When, on cross-examination of a party to a suit, he is questioned concerning statements made by him in which he did not mention a promise which he claims to have been made to him, and his original complaint is also offered in evidence to show that no allegation of such promise was contained in it, it is proper to receive evidence of the attorney who drew such complaint to the fact that the plaintiff, in his statement of the case, did mention such promise. Such testimony tends to show that the failure to rely on the promise in the complaint was due to the attorney. (pp. 943, 944.)

TRIALS—Right of Re-examination to Explain Answers Given on Cross-examination.—If there is any occasion to explain an answer given on cross-examination, the court should not exclude a question by way of re-examination proposed for the purpose of eliciting such explanation where there is no effort at undue repetition of the same statement. (p. 944.)

Action against the defendant railway corporation to recover for personal injuries received by the plaintiff while in its service. At the trial, Thomas Paxton was examined as a witness on behalf of the defendant. On cross-examination he was asked: "Is it the duty of an engineer—suppose he is at Purcell—isn't it his duty to telegraph down there and get some one to fix it?" (meaning a defect about the engine). He answered: "Yes, sir; he is supposed to have it fixed if he understood that it was such a defect as would likely injure some one."

On redirect examination counsel for defendant asked: "What do you mean by saying, 'if the engineer so understood it'?"

To which he replied: "If the engineer considered that it was dangerous, I mean he would undoubtedly take steps to have it repaired." Thereupon counsel for defendant propounded the following question: "Suppose as to this particular defect that the fireman's attention is called to it and it is put under securely. State to the jury whether or not as applied to the fact it would be the duty of the engineer to telegraph to Gainesville to have some one come down there and fix that step." To which question counsel for plaintiff objected, and the objection was sustained. This was followed by this question: "State whether or not it was such a repair that under the rules and practice and custom of the company was made or required to be made at Gainesville." To which question and the testimony sought to be elicited thereby plaintiff objected, and the objection was sustained.

J. W. Terry and Ballinger Mills, for the plaintiff in error.

S. C. Padelford and Stanford & Watkins, for the defendant in error.

613 WILLIAMS, A. J. Defendant in error was a fireman on one of the passenger engines of plaintiff in error and was hurt while attempting to get upon the engine at Saginaw, forty or fifty miles south of Gainesville, by the turning of a step, which was in a loose and dangerous condition. The loose condition of the step had been brought to his attention earlier during the same trip at Purcell, Indian Territory, by the engineer, who, according to the testimony of defendant in error, said: "Here is a loose step; hand me the wrench." Defendant in error further testified that after trying to tighten the step, the engineer found he could not do so with the only wrench at hand, and turned it under the side of the engine, saying: "I'll have it fixed." This is all that took place at that time. At Gainesville, which is between Purcell and Saginaw, the company had shops and car inspectors and repairers, and the defect could have been remedied in a few minutes with the proper wrench. There is a dispute as to the character of defects in engines and cars which were usually repaired at Gainesville into the details of which we need not enter. There is evidence to the effect that when the train stopped at Gainesville there were inspectors and repairers present with whom the engineer was seen by defendant in error in conversation. Defendant in error left the engine and was absent ten or twenty

minutes to get his supper and on his return the train proceeded southward. When it reached Saginaw defendant in error descended from the engine to perform a duty and in attempting to ascend again was hurt as stated. One of his contentions is that he believed the step had been fixed at Gainesville and was in proper position and condition for use. The evidence was not conclusive on this point, but was such as to make it necessary for the jury to determine whether or not he in fact acted on this belief, and whether or not he was justified by the circumstances in so believing and acting.

The charge of the court, among other things, contained the following:

"6. The servant by entering the service of the master assumes all the ordinary risk incident to the business but not those arising from the master's neglect if the master should be guilty of negligence. It is the duty of the master to exercise ordinary care to furnish the servant machinery and appliances, and the servant has the right to rely upon the presumption that the master has done his duty in this regard; but if he learns that the appliances furnished are defective he assumes the ⁶¹⁴ risk incident to that condition of affairs, unless the master is informed of such defects and promises the servant to remedy the defects if any. In this latter event, so long as the servant has reasonable grounds to expect, and does expect, that the master will fulfill his promise, the servant does not by continuing in the employment assume the additional risk arising from the master's neglect. If the servant then be injured, he may recover, provided that it be found that a man of ordinary prudence under all the circumstances would have encountered the danger by continuing in the service, and if the master has promised to repair such defect, if any, the servant may presume that the master has complied with the promise, and the servant is not required to inspect the appliance before using it to ascertain whether the repairs have been made, unless there is something in the condition of the appliance which would cause an ordinarily prudent person to make an examination of said machinery.

"7. If you find from the evidence that it was the duty of the engineer on said engine upon which the plaintiff was working at the time of his injury to have any defects on said engine, if there were, repaired, then the promise by said engineer to make repairs of said defects would be the promise of the defendant."

This relieved the servant from the effect of an assumption of risk, arising from knowledge of the defect, by force of a promise of the master to repair, assuming that there was evidence of such a promise as would give application to this doctrine. The remark of the engineer cannot be so construed. The true doctrine relates only to promises or assurances made by the master to the servant, upon discovery of defects in tools or appliances, to remove the objection of the servant to using them and to induce him to continue in the service: *Lewis v. New York etc. Ry. Co.*, 153 Mass. 73, 26 N. E. 431; *Sweeney v. Berlin etc. Envelope Co.*, 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390, 47 Atl. 613. There is nothing of the nature of such a promise in the casual remark of the engineer to the defendant in error, and the doctrine laid down in the case of *Texas etc. Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971, and like cases, has no application. There being no such facts, the question whether or not a promise otherwise filling the requirements of the rule, made by the engineer, who had no power to employ and discharge defendant or other servants would be treated as that of the master, does not arise. In the second appeal of the *Bingle* case there was an expression in the opinion of the court of civil appeals concerning the effect of the promise of the engineer in that case which probably led the trial court in this case to treat the promise of the engineer as that of the company. The facts of that case relating to the question, which are not fully stated in any of the reports, were very different from those here in question; and the point now made was not passed on by this court in refusing a writ of error and probably not by the court of civil appeals. As the question is not now involved, we deem it unnecessary to point out the differences between the two cases, ⁶¹⁵ or to pursue the subject further than to say that we do not regard the decision referred to as authority for the proposition that a promise to a fireman made by an engineer in charge of a train, with no power of employing and discharging servants, is to be imputed to the master. It is not to be inferred that the statement of the engineer is not admissible as evidence upon the true issues in the case. Although a servant may at one time have known of the existence of a defect, he may not know of it at the time he undertakes to use the appliance, and circumstances may justify him in believing that the defective condition has been remedied. Some of the evidence tended to raise that question, and to it the state-

ment by the engineer that he would have the step fixed was relevant; and the circumstances taken together raised the question whether or not the defendant in error, when he used the step, knew or should have known that it was still in the dangerous condition, or believed that it had been repaired and was justified in such belief; and whether or not he was so justified would depend upon the inquiry whether he judged and acted upon facts with ordinary prudence: *Northern Pac. R. R. Co. v. Babcock*, 154 U. S. 200, 14 Sup. Ct. Rep. 978. It was contended in the argument that this view of the law was embodied in the charge and that, under it, the facts justified the recovery. It may be true that the charge authorized a recovery upon this theory, but it is also instructed as to the effect of a promise by the master, giving to it the weight indicated by the passages which we have quoted, and it cannot be said that those instructions did not influence the verdict. Conflicting theories were thus embodied in the charge, under one of which the servant must have been ignorant of the condition of the step when he used it, while under the other he may have known it, but because of the promise, is not held to an assumption of the risk.

During the trial defendant in error was cross-examined concerning statements which he had made of the facts of the accident in which he did not mention the so-called promise of the engineer; and, also, the fact was developed that in his original petition he had made no allegation of that fact, the position of counsel for plaintiff in error being that the evidence of such promise was fabricated as an afterthought. In rebuttal, the attorney who drew the petition was allowed to state that his client, in his statement of the case, did include the promise as he stated it on the stand. One of the assignments questions the ruling admitting this testimony. In the case of *Aetna Ins. Co. v. Eastman*, 95 Tex. 34, 64 S. W. 863, this court had occasion to examine the question as to the admissibility of statements by a party to the suit corroborative of his evidence given on the stand, when such evidence has been contradicted by proof of contrary statements made elsewhere, and the rules generally obtaining were stated in the opinion of Chief Justice Gaines. How far the rules laid down might be applicable, had there been no attempt to inferentially contradict the witness by the absence of mention in the petition of the fact in question, we are not called upon to consider. The evidence objected to tended to show that such omission was not that of ⁶¹⁶the defendant in error, but of his counsel, and to rebut the inference

contended for, and was therefore admissible. The question as to the propriety of the refusal of the court to permit counsel for plaintiff in error, on re-examination of the witness Paxton, to draw from him an explanation of his answer given in cross-examination, will not probably arise again; but, as the record shows the matter, we think the question should have been allowed. It appears from the statement of the facts that there was occasion for the explanation asked and it does not appear that there was an effort at undue repetition of the same statement.

Reversed and remanded.

A Servant, by Continuing in the Service for a reasonable time after a promise on the part of his master to repair a defective appliance, does not thereby assume the risk: Rice v. Eureka Paper Co., 174 N. Y. 385, 95 Am. St. Rep. 585, 66 N. E. 979; Yerkes v. Northern Pac. Ry. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961, and cases cited in the cross-reference note thereto; monographic notes to Gulf etc. Ry. Co. v. Brentford, 23 Am. St. Rep. 386; Buzzell v. Laconia Mfg. Co., 77 Am. Dec. 224.

S. BLAISDELL, JR., COMPANY v. CITIZENS' NATIONAL BANK OF TYLER.

[96 Tex. 626, 75 S. W. 292.]

BILLS OF EXCHANGE—Liability of Purchasers or Payees.—One who has accepted or paid a bill of exchange drawn on him cannot defeat his acceptance by recovering the money paid because there was no consideration, or the consideration has failed as between him and the drawer, when the payee bought from the latter, for value, without notice of the defense. (p. 950.)

PLEADING—Conclusions, Effect of Admitting by Demurrer.—An allegation that certain drafts or bills of lading were indorsed in blank and were transferred to a purchaser by a defendant banking company, whereby it became the owner of such drafts and bills of lading and the cotton represented thereby, and undertook and promised to carry out the contract made between plaintiff and the shipper, states a mere conclusion of the pleader, and a demurrer to the complaint does not admit that the transaction was other than an ordinary purchase of a draft accompanied by a bill of lading. (p. 951.)

BANKING—Liability of Bank Purchasing and Collecting Shipper's Draft.—A banker who purchases a shipper's draft of his consignees, accompanied by a bill of lading to the shipper's order, and presents such draft and bill of lading to the consignee, and receives payment of the draft, and delivers the bills of exchange, does not thereby become a party to the contract of sale entered into between

the shipper and the consignee, nor answerable for the difference in value between the amount of property specified in the bill of lading and the amount actually shipped, where the shipper had fraudulently procured a bill of lading in excess of the property shipped, but the bank was ignorant of the fraud and not guilty of any negligence or misconduct on its part. (p. 955.)

W. S. Thomas and J. O. Mahaffey, for the appellant.

Gregory & Batts, Marsh & McIlwaine and Fiset & Miller, for the appellee.

628 WILLIAMS, A. J. The court of civil appeals for the first district have certified for decision the case stated as follows:

"In this cause now pending before this court on motion for rehearing the trial court sustained a general demurrer to the plaintiff's petition, and the latter, refusing to amend, has appealed. The petition is as follows:

"Now comes the S. Blaisdell, Jr., Company, plaintiff, complaining of Newell W. White and A. Hicks, who compose the firm of Newell W. White & Company, both as individuals, and as a firm, and the Citizens' National Bank of Tyler, defendants, and leave of the court first had and obtained, files this its first amended original petition in lieu of and amending its original petition filed herein on the sixth day of May, 1901, and so amending respectfully shows and represents to the court as follows, to wit:

"1. That the plaintiff is a private corporation duly incorporated under the laws of the state of Massachusetts, and having its place of business in the city of Chicopee, in the county of Hampden, in the said state. And the defendant Newell W. White and A. Hicks are resident citizens of Smith county, Texas, and are and have been since prior to the first day of October, 1900, partners in trade under the firm name of Newell W. White & Company, and that the defendant, the Citizens' National Bank of Tyler, is a private corporation, duly incorporated under the laws of the United States of America, with its place of business in the city of Tyler, Smith county, Texas, of which J. W. Wright, **629** whose residence is said Smith county, Texas, is president and upon whom service can be had.

"2. That heretofore, to wit, on or about the twenty-sixth and twenty-ninth days of October, 1900, and the thirteenth day of November, 1900, plaintiff, then doing business in the said city of Chicopee, offered and proposed to the defendants Newell W. White and A. Hicks, who were then doing business

in the city of Tyler as partners, under the said firm name of Newell W. White & Company, to purchase from them certain bales of cotton at the prices hereinafter stated, to be delivered by the said defendants to plaintiff as follows, to wit: [Here follows number of bales and place of delivery, which it is not necessary to set out.]

“ ‘Which said offer and proposal so made by the plaintiff was on or about said above-mentioned dates accepted by the defendants, and they then and there entered into a contract with the plaintiff whereby it was agreed that the said defendants should in the due course of trade and at as early date as possible deliver to the plaintiff at the above-mentioned points said bales of cotton as above set out, and that the plaintiff was to pay the said defendants therefor upon the presentation to it of drafts with bills of lading attached thereto, showing that said cotton had been delivered to a carrier for transmission to plaintiff at said points the amounts above stated for each and every pound of cotton so delivered.

“ ‘3. That said defendants Newell W. White & Company under said agreement, and to the end of fulfilling the same, did on divers and sundry dates hereinafter shown deliver to the International and Great Northern Railroad Company, a common carrier, for transmission to plaintiff at said points of delivery certain bales of cotton, to wit: [Here follows detailed statement of several shipments.]

“ ‘And took and received from said carrier bills of lading in the name of Newell W. White & Company for each and all of said shipments, and said defendants having so received said bills of lading, drew sight drafts on plaintiff purporting to be for the amount of the purchase prices of said cotton, calculated upon the true weights thereof, less the freight charges and brokerage, which under the said contract were to be paid by the defendants and which for that reason were deducted from the purchase prices, the said drafts being payable to the order of Newell W. White & Company and being in amounts as follows, to wit: [Here follows detailed statement of the amounts of the various drafts.]

“ ‘Which said drafts, the said drafts being negotiable instruments, and said bills of lading were by said defendants indorsed in blank in the name of Newell W. White & Company and were transferred to and purchased by the defendants herein, the Citizens' National Bank of Tyler, whereby the said bank became and was the owner of said drafts and bills of lading and

of the cotton represented by said bills of lading, and whereby said bank undertook, promised and agreed and became bound unto the plaintiff to carry out and fulfill the defendants Newell W. White & Company's said contract with plaintiff above set out.

“4. The said bank having by the means aforesaid become the owner and holder and proper payee of said drafts and bills of lading and cotton aforesaid, forwarded the said drafts along with said bills of lading to its agents and correspondents for collection from the plaintiff, which said drafts and bills of lading accompanying the same reached plaintiff and were accepted and paid by plaintiff long prior to the time when said cotton which had been shipped by freight did or could have reached its destination, by reason of which plaintiff was forced to and did rely solely on defendant to deliver to it the amount of cotton represented by said draft with freight and brokerage added, at the purchase price herein shown and for which the plaintiff had paid them as aforesaid. And plaintiff believing that said drafts less said freight charges and brokerage represented the true amount of the purchase prices of said cotton calculated upon the true and correct weight thereof, paid said drafts, freight charges and brokerage before it could have examined or weighed said cotton, all of which the defendant well knew the plaintiff would be forced to do when they shipped said cotton and drew and discounted said drafts, and which was also shown to the said bank when it purchased said drafts and bills of lading, and it undertook to carry out said contract as aforesaid.

“5. That the defendants Newell W. White and A. Hicks, contriving and fraudulently intending to deceive and defraud plaintiff in this behalf, did not deliver to it the amount of cotton in weight represented by the amount of said drafts, freight charges and brokerage, at said purchase prices, and which plaintiff had paid them for, but falsely made out said drafts for an amount grossly in excess of the amount they were entitled to receive from plaintiff calculated upon the true weight of said cotton, for the purpose of defrauding plaintiff as aforesaid, for all of which the defendant bank, by reason of its having purchased said drafts and bills of lading and become the owner of said cotton and undertaken to carry out said contract is liable to plaintiff, while in truth and in fact the true weight of said cotton so shipped was only as follows, to wit: [Here follows statement of weights.]

“That had the said cotton been of a weight sufficient at said purchase prices to have made the amount of said drafts including all freight and brokerage the same would have been as follows, to wit: [Here follows statement of weights showing the shortage.]

“Which said difference in weight between the cotton actually delivered and the amount for which the plaintiff had paid said defendants as aforesaid at said purchase prices amounting to the sum of three thousand seven hundred and twenty-seven dollars and thirty-four cents, as is more particularly shown by the itemized statement which is hereto attached marked exhibit “A” for identification and made a part of this petition, which sum is three thousand seven hundred and twenty-seven dollars and thirty cents, the said Citizens’ National Bank of Tyler by the manner and means herein alleged has collected, had and received from plaintiff over and above the amount it was justly entitled to receive, and which it now still wrongfully withholds from the plaintiff, ⁶³¹ and which amount the defendants, although often requested, have failed and refused and still fail and refuse to pay, to plaintiff’s great damage.

“6. And plaintiff further alleges that if it be mistaken in its allegations that said Newell W. White and A. Hicks were partners and that said contract of sale was made and said drafts drawn on said cotton shipped and said drafts and bills of lading were transferred, sold and indorsed by them to defendant bank as partners, plaintiff alleges that all of said things were done and performed by one or both of them as individuals, and that the said Newell W. White was in and about said transaction doing business under the said name of Newell W. White & Company, and plaintiff alleges that it is unable hereto state whether or not in said transaction the said Newell W. White and A. Hicks were partners or whether said acts and things herein alleged to have been done by them were done as individuals or done by them jointly or severally, for the reason that the knowledge of the true nature and manner of said transaction is unknown to plaintiff and cannot be ascertained by it and is peculiarly within the knowledge of the said defendants, Newell W. White and A. Hicks.

“Wherefore the premises considered plaintiff sues and prays that, defendants having been duly cited, that upon final hearing it have judgment against all of the aforesaid defendants for the amount of its said damages, for costs of suit, and for all

such other and further orders, judgments and decrees as it may be entitled to under the law and the facts, both generally and specially, both in law and equity, and in duty bound will ever pray.'

"We respectfully propound for your decision the question: Did the trial court err in sustaining the general demurrer?"

The action appears to be founded on the idea that by the transactions alleged the bank became a party to the contract of sale between plaintiff and White & Company, bound to perform the undertakings of the latter, and therefore liable for the violation of their agreement. It is not averred that the bank was a party to or had notice of the fraud charged against White & Company, or was guilty of any negligence or misrepresentation, or in any way deceived plaintiff, and hence the action cannot be maintained as for deceit, fraud or negligence on part of the bank.

The theory of the plaintiff is supported by the decision of the court of civil appeals for the third district in the case of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, which was followed by the supreme court of North Carolina in the case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251. We understand the courts to hold in those cases that a purchaser of such drafts and bills of lading is substituted, by the mere purchase, in the place of the vendor in the contract of sale, becomes bound to perform that contract as a condition precedent to his right to the price of the goods represented by the bill of lading; and that, therefore, although the drafts be actually accepted and paid by the drawee, if the consideration which he was to receive from the drawee fails, the price may be recovered from the holder to whom the payment has been made. It is undoubtedly true that the purchaser acquires by his purchase no greater rights than the drawer has against the drawee. The attitude of the latter is, so far, unchanged, and he is no further bound to the purchaser than he would be bound to the drawer to accept or pay; but we do not agree that the purchaser becomes bound to perform the contract of the vendor, nor that, when the bill of exchange is subsequently accepted or paid, he acquires no additional right against the acceptor or payor. Transactions of this kind have often come before the courts and we understand the rule of the commercial law to be thoroughly established, that one who has accepted or paid a bill of exchange drawn upon him, cannot defeat his acceptance or recover the money paid because there was no consideration, or the consideration has failed, as between him and the drawer, when

the payee bought from the latter, for value, without notice of the defense. The leading cases on the subject have arisen where bills of lading for goods were forged and attached to drafts drawn for the prices of the goods, negotiated with banks, and forwarded to and accepted or paid by the drawees, without knowledge on the part of either holder or drawee of the forgery. Efforts of the acceptors to avoid liability on acceptances and of payors to recover the money so paid have been defeated, both in courts of law and of equity: *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. Rep. 318; *Robinson v. Reynolds*, 2 Ad. & E. 196; *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 4; 1 Daniel on Negotiable Instruments, secs. 174, 175, and notes; *Marsh v. Low*, 55 Ind. 271. Other authorities are cited in those referred to.

In *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 4, Lord Campbell said: "I think that dangerous consequences would follow, and the credit of bills of exchange be very much shaken, if the title of the indorsees of bills of exchange, as against the acceptor, under such circumstances, could be called in question. It is allowed that the case of *Robinson v. Reynolds*, 2 Ad. & E. 196, was well decided, that its authority has never been questioned, and that it is a part of the commercial law of England." After further discussing the cases, he says: "It must be considered that the bills were accepted by Thiedemann (the drawee) on the credit of Homeyer (the drawer and forger), and for that reason it would be alarming if the title of the indorsees (they holding the bills bona fide for value) could be thus impeached."

In the case of *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181, the supreme court of the United States thus states the doctrine: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, ⁶³³ as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. . . . Different rules apply between the immediate

parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows, first, that which the defendant received for his liability, and secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff.”

It is claimed that the allegation in this case, that not only the drafts but the bills of lading were purchased by the bank, distinguishes it from those cited where the bills merely accompanied the drafts as security. The facts alleged in the petition do not show this to have been other than the common transaction in which money is paid for drafts accompanied by bills of lading, representing the goods consigned as security. The allegation is that the drafts and bills of lading were indorsed in blank and were transferred to and purchased by the bank. The conclusion from these facts is then stated: “Whereby said bank became and was the owner of said drafts and bills of lading and of the cotton represented.” This is only a conclusion from the facts previously stated and can not be held to enlarge the legal effect of those facts. The drafts were for the price of cotton which the drawer was under obligation to deliver to the drawee on payment. The bank’s right was therefore only to receive the amount called for by the drafts, and, on payment thereof, it was bound to deliver to the payor the bills of lading representing the cotton. The bank became the owner,

only as the facts alleged made it the owner, of the cotton; and this was only in the limited sense that it could hold and control the cotton until the drafts were paid, and as a means of insuring payment or recovering loss. No contract or agreement of the bank, either with the drawer or drawee, is alleged to make its relation to the contract of sale other than that which resulted from the simple fact that the drafts for the price of the cotton and the bills of lading were ⁶³⁴ purchased by it from the vendors of the cotton. The concluding language in the fourth and fifth paragraphs of the petition, referring to the undertaking of the bank to carry out the contract, does not charge nor, as we construe the pleading, intend to charge, that the bank affirmatively agreed to carry out the contract, but states, as the pleader's construction of the facts alleged, that such undertaking arose from the purchase, as held in *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48. Necessarily, the legal effect of the transaction stated between the bank and White & Company was only to entitle the former to collect, either from the drawee or, in case of its refusal to pay, from the drawers, the money called for by the drafts, and, to secure this right, a limited ownership and control of the cotton was conferred by the indorsement and delivery of the bills of lading. Such is the legal effect of the facts alleged, and such was the legal effect of the transactions passed upon in the authorities cited; and those decisions clearly control this case. It was as true in those cases, as it is in this, that the purchasers of the bills of exchange secured by the bills of lading originally acquired only such rights against the drawees as the drawers had against them, and that, in order to put the holders in a position to require acceptance or payment of the bills of exchange, performance of the contract of sale by the drawers was essential; and it is equally true in this case, as it was in those, that, in paying the drafts, the drawees, acting on the credit of the drawers and not of the holder, became bound to the latter, and that a failure of the consideration moving from the drawers to the drawee cannot affect the rights of the payee thus acquired in good faith upon a consideration moving from itself to the drawers.

The latest decision called to our attention is that of the supreme court of Iowa in the case of *Tolerton v. Anglo-California Bank*, 112 Iowa, 706, 84 N. W. 930, in which the court, after discussing *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, and *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, enunciates what we regard as the correct rule.

The decisions referred to are wholly inconsistent with the theory that in such a transaction the purchaser of the draft and bill of lading becomes substituted for the vendor to such extent that he assumes the obligations of his contract with the vendee. This is not true of assignees generally. While an assignee may not by his assignment acquire any right against the party against whom the claim is asserted, he does not, by taking the assignment merely, assume the obligations of the assignor. The true question in such cases is whether or not money so paid upon bills of exchange can be recovered as having been paid by mistake, which is negatived by the rules of the law-merchant; and not whether or not there has been a breach of contract by the holder, who never has a contract with the drawee of the bill of exchange until the latter honors it.

We answer that the court did not err in sustaining the general demurrer.

Bona Fide Ownership of Negotiable Paper is discussed in the monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 309-326. As to the defense of want of consideration as against a bona fide holder, see *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778, 36 S. W. 705.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

HURXTHAL v. BOOM COMPANY.

[53 W. Va. 87, 44 S. E. 520.]

COVENANTS.—A Covenant is Said to Run with the Land When either the liability to perform it or the right to enforce it passes to an assignee of the land. (p. 959.)

COVENANTS.—To Create a Covenant Real There must be Privity Between the Parties. Otherwise it is simply a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees, or assigns. (p. 959.)

COVENANTS.—A Covenant does not Run with the Land Unless contained in some grant thereof or of some estate therein (p. 959.)

COVENANTS REAL—Mere Words of Description cannot Create.—If a covenant is not in its nature and kind a real covenant, the mere declaration of the parties that it shall run with the land cannot make a real covenant, though so stated in the document. (p. 959.)

COVENANT Binding the Land—Right of Assignee of Grantee to Recover upon.—Where, in a contract between the owner of lands and another, the latter agrees to maintain and keep in good condition certain dams for a consideration specified, and the contract declares that it shall continue in force for five years, and at the option of the land owner, his heirs, representatives, and assigns exercised within five years, the agreement shall continue in force for ten years from its date, the grantee or other successor to the title of such land owner may maintain an action against the other party to the contract for a breach thereof. (p. 960.)

COVENANTS—Assignee of, Who is.—Where an agreement with a land owner stipulates for the maintenance and repair of certain dams for the benefit of his land, and purports to be in his favor and that of his heirs, representatives, and assigns, one who, after his death, purchases such lands at a judicial sale is entitled to sue upon the agreement as "assignee." (p. 960.)

RES ADJUDICATA—Decree Allowing a Claim Against an Estate.—If a bill is brought to convene the creditors of a decedent, and states that a person named claims a debt against the decedent, which was not conceded by him, and such person appears in such proceeding and presents such claim, which is for maintaining and keeping in repair certain dams according to the terms of a written agreement, and evidence is taken to sustain and to repel the claim, and a decree results allowing it, this is conclusive upon the administrator and successor in interest of the decedent's title to the lands benefited by the agreement that the claimant had not committed any breach of it, and if such lands are subsequently sold to pay the debts of such decedent, the purchaser cannot maintain an action against such claimant for a breach of the agreement alleged to have occurred during the time for which the claim was allowed. (p. 962.)

RES JUDICATA—Time and Parties to Which Applies.—A decree establishing a claim against the estate of a decedent for acts claimed to be done in the performance of a covenant for the benefit of his land, while conclusive of such performance during his lifetime, is not conclusive that a breach of the covenant was not committed after his death, and does not prevent one who has acquired title to such land under a decree directing its sale for the payment of decedent's debts from maintaining an action for the breach of such covenant alleged to have been committed during the plaintiff's ownership. (p. 962.)

DAMAGES, Entire and Permanent, When Recoverable and When not.—If a cause of injury is in nature permanent, and the recovery for such injury would confer a license on the defendant to continue it, entire damages may be recovered in a single action; but where the cause is not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once a heavy recovery for entire, permanent, and lasting damages, including the future, damages cannot be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues to inflict damages. (pp. 963, 965.)

COVENANT—When a Breach does not Support a Recovery as for a Total Breach.—One suing for the breach of a contract to maintain a dam at a specified height for a designated number of years, and establishing such breach at a time anterior to the commencement of the action, is not entitled to treat the contract as abrogated, and to recover, in addition to the damages sustained up to the present time, also all future damages which the jury believe must necessarily result from such total breach down to the end of the contract. (p. 964.)

NEGLIGENCE, Contributory as a Bar to Actions of Contract. In an action to recover damages for the breach of a contract, the contributory negligence of the plaintiff ordinarily does not preclude his recovery, as would be in the case of an action of tort. Such negligence rarely releases the defendant from the obligation to perform his contract, but is always to be considered in fixing the amount of the damages, i. e., so much of the damage as is attributable to the plaintiff's negligence should be excluded from the recovery. (p. 967.)

DAMAGES Allowable for the Breach of a Contract must not go beyond fair compensation for the total loss sustained and must be such as are the reasonable and probable consequences of the act complained of. (p. 968.)

DAMAGES—Punitive Damages cannot be Allowed in Actions on the Case. (p. 968.)

A. M. Prichard and S. S. Greene, for the plaintiff in error.

Flournoy, Price & Smith and A. B. Littlepage, for the defendant in error.

⁸⁹ BRANNON, J. Josie M. Hurxthal brought an action of covenant against St. Lawrence Boom and Manufacturing Company in the circuit court of Greenbrier county and received a verdict and judgment for four thousand dollars, and the company sued out this writ of error.

Ben Hurxthal owned a flour and grist-mill on Greenbrier river, which was supplied with water by a race fed by a dam in the river near the head of the race. The said company owned a sawmill which was also fed by said mill-race at a point some distance above the Hurxthal mill. The said company had booms in the river above the mill-race for catching logs. The logs sawed on the company's sawmill were floated down the river to the head of the mill-race and then down the mill-race to a point a little above the sawmill, at which point the logs left the mill-race and were floated to the mill on a lateral channel leading from the mill-race to the river. Near the point where this channel entered the river the channel was divided into two parts by an island and across the two mouths of this channel, which channel is called a log pond, there were two small dams erected to prevent the water which flowed into the mill-race at its head from going into the river through the log pond, not only to keep the pond from being too shallow but, also to keep it from being lost from the grist-mill farther on down.

⁹⁰ These dams had been erected by the Boom Company. On the thirteenth day of June, 1894, said Boom Company and Ben Hurxthal entered into an agreement, under seal, by which the said company bound itself to "maintain and keep in good repair the said dam in Greenbrier river" and the two small dams at the foot of the log pond for a period of five years. The said river dam was to be maintained at the height which should give the same head of water as if erected at the site of an old dam which stood just below the head of said mill-race, and had been built at the latter point seven feet high from the surface of the water at low stage—the object being to make the dam equivalent to a seven foot dam on the old site. The agreement further bound the company to maintain in good repair the two dams at the foot of the log pond at such height as should prevent the water in the mill-race from being drawn off through the channels closed by the said two small dams. The agree-

ment gave the right to the company to maintain the trestle that crossed the race leading to the said grist-mill at the point where the trestle then stood, and also to maintain the bridge across the race which then stood across it, and to use said trestle and bridge, and bound the company to keep the trestle and bridge free from such trash as might impede the flow of water through the race to said grist-mill. For maintaining said dams the agreement bound Ben Hurxthal to pay the company seventy-five dollars per year, and said "the obligation to pay the same shall, in addition to being a personal one, be a covenant running with the land and binding upon said Ronceverte Flour Mills, mill-race and water-power into whosoever hands they may pass." The agreement contained the language: "This agreement shall continue in force for the period of five years next ensuing the date thereof, and at the option of the said party of the second part, his heirs, representatives or assigns, to be exercised by notice in writing to said party of the first part given within the said five years, shall continue in force ten years from date thereof."

Several years after the date of the agreement Ben Hurxthal died and Josie M. Hurxthal, as his administratrix, brought a chancery suit to convene all the creditors of said decedent's estate, ascertain their debts and sell his real estate, including said grist-mill property, to pay such debts, and under a decree in that case the ⁹¹ said grist-mill was sold on March 16, 1899, and purchased by Josie M. Hurxthal, the plaintiff in the action of covenant. On the 13th of June, 1899, Josie M. Hurxthal gave a written notice to the said company that she would extend the operation of the said agreement for the additional period of five years as provided therein. She paid seventy-five dollars to said company for the maintenance of said dams for one year after the 13th of June, 1899. In her bill in the said chancery suit brought by Mrs. Hurxthal as her husband's administratrix to convene her husband's creditors she specified various debts against her husband's estate and its lands as stated that "the St. Lawrence Boom and Manufacturing Company claims a debt against said Ben Hurxthal, which was contested by him." The said company presented its claim in that suit before the commissioner for three hundred dollars against Hurxthal's estate for compensation under said agreement for the maintenance of said dams for four years during the lifetime of the said Hurxthal. The estate of Hurxthal contested this demand of the company and took evidence to repel it and

the company took evidence to sustain it. The commissioner disallowed the claim. Then the company filed its answer to the bill, setting up the said agreement and claiming the said three hundred dollars for keeping up the said dams for the said four years, the said company having been made a formal party defendant to the bill filed by said administratrix. The case was referred back to the commissioner to report the debts of said estate, and before him both sides took evidence to sustain and repel such demand, and the result was that the commissioner again rejected said demand as a claim against the estate; but upon an exception to his report by the company the court allowed the said demand and decreed it as a debt against Hurxthal's estate, but only as a general debt, and not as a lien on the grist-mill property. Then the company appealed the case to this court because of the refusal of the circuit court to decree its debt as a lien under said agreement, and accord to it its proper preference over other debts, and this court declared it such lien, as will be seen in *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237. Afterward, as first above stated, Josie M. Hurxthal brought said action of covenant against said company, claiming that the company had not kept the covenant contained in said agreement of the 13th of June, 1894, but had broken the same in failing to maintain the said ⁹² dam across Greenbrier river and said two dams at the foot of said log pond at the height stipulated by said agreement, and in suffering and permitting debris to accumulate in the mill-race at the points where the company's bridge and trestle crossed said race, thereby preventing the flow of a sufficient quantity of water to the plaintiff's grist-mill to operate the same.

A question going to the very root of the case, because involving the very right of the plaintiff to sue upon the agreement on which her suit is based, arises upon the plaintiff's first instruction saying, that if she, before the 13th of June, 1899, gave the company written notice that she elected to extend the agreement of the 13th of June, 1894, for five years after the 13th of June, 1899, then the plaintiff had succeeded to the rights of Ben Hurxthal under that agreement. This involves the question whether the covenants in said agreement binding the company to maintain the dams as therein provided, and not to suffer or permit the accumulation of trash in the mill-race, are covenants real running with the grist-mill property and inuring to the benefit of the plaintiff as its owner derivatively from Ben Hurxthal, and thus entitling her to sue for an

infraction of that agreement; or are mere personal covenants binding the company only as such, and not authorizing the plaintiff, as successor in ownership of the grist-mill, to sue for the infraction of the agreement. "A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land": 8 Am. & Eng. Ency. of Law, 134. When the company made those covenants it passed no estate in the mill property to Hurxthal. The company and he were strangers in estate. To create a covenant real there must be a privity in estate between the parties—otherwise it is simply a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees or assigns: *Lydick v. Baltimore etc. R. R. Co.*, 17 W. Va. 427; *West Virginia Trans. Co. v. Ohio River etc. Co.*, 22 W. Va. 631, 46 Am. Rep. 527; 2 Minor's Institutes, 715. "It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the parties, and the covenant must have relation to an interest created or conveyed in order that the covenant may pass to the grantee of the covenantee": 8 Am. & Eng. Ency. of Law, 147. "A covenant does not run with the land unless contained in a grant thereof, or of ⁹³ some estate therein": *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53. It is true that this covenant has one element of a covenant real in the fact that it benefits the estate of the covenantee, the mill property; but it lacks another material element—privity in estate—as the company conveyed no interest in the mill, but merely made a personal obligation on the company touching the mill. So this covenant is not, in its inherent nature, a real covenant. But does its language make it such? The agreement makes the obligation of Hurxthal to pay for maintaining the dam run with the land. It seems under law above stated this would not perhaps make it a covenant real; but it was clearly a lien in its terms as an equitable mortgage. There is no such provision as to the covenants made by the company, and we infer it was not so intended. But there is the clause in the agreement giving the right to the assignees of Hurxthal to continue the agreement for five years. What is the effect of that clause? It seems to be well settled in law that if a covenant is not, in nature and kind, a real covenant, the mere declaration of the parties that it shall run with the land will not make it a real covenant, though so stated in the document: 8 Am. & Eng. Ency. of Law, 134; 2 Washburn on Real Prop-

erty, secs. 1203, 1205; *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 149. Under this authority I do not see how a covenant not one of such nature as to run with land could by declaration in the agreement be made such, so as to place an obligation on the land in the hands of subsequent owners; but this covenant is one not placing the burden on the Hurxthal mill, but benefiting it, and the company agreed that benefit should go to the use of the assigns of Hurxthal. The point is not without difficulty; but it does seem to me that under these circumstances this consent of the company, while it would not place a burden on the company property, would give the mill property of Hurxthal the benefit of the covenant, so as to enable the plaintiff as alienee to sue upon it. I do not know that it will add anything to the strength of the position, in a legal point of view, to rely upon the fact that the company accepted from the plaintiff pay for one year's maintenance of the dam. If the covenant does not give her right, it would be doubtful whether an oral agreement would do so under the statute of fraud, as being a contract not performable in one year, though the statute is not ⁹⁴ pleaded. This is not material, however, because I hold that the plaintiff is entitled to sue for a breach of covenant occurring during her ownership, by reason of the clause giving the benefit of the agreement to the assignee of Ben Hurxthal. There can be no question but that the plaintiff is a privy in the estate with Ben Hurxthal, and an "assign" within the meaning of that word used in said agreement; for she purchased at the judicial sale, which by law cast upon her the entire estate of Ben Hurxthal, and she is as much an assignee of the property from Ben Hurxthal as if he had conveyed it to her: 8 Am. & Eng. Ency. of Law, 146; Rawle on Covenants for Title, sec. 213; Tiedeman on Real Property, sec. 860; *Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. 870. So the plaintiff can recover if the defendant failed in its covenants after the plaintiff acquired the property, March 16, 1899, the date of her purchase at the court sale. Upon these questions of fact, in view of a new trial, we decline to pass. Therefore plaintiff's first instruction is good, and defendant's first and second bad, because denying right to sue.

Another question arising in the case comes from the claim of the company that the matter in controversy in this suit was adjudicated finally, and the plaintiff barred by reason of the decree in the suit of the administratrix mentioned above brought to convene the creditors of Ben Hurxthal's estate. The

bill brought before the court for adjudication the question whether the company had a valid debt against the estate. Though the bill presented this matter very indefinitely, yet it presented it and made the company the defendant, and it could not have presented it for any other purpose than for adjudication. I apprehend that a bill of that character need not specify the debts against the estate with particularity which would be called for in suits of a different character, the suit in question being only one to bring the assets of a decedent before the court for adjudication, and the creditors and their debts come in before the commissioners without pleading or formal issue. Section 7 of chapter 86 of the Code makes such a suit the vehicle of relief to all creditors, whether parties or not, or whether their debts are specified or not in the bill. The section provides that evidence respecting the claim of any creditor may be taken just as if such creditor were made a formal party and his rights set up in the bill. The reference to a commissioner enables that creditor ⁹⁵ to present his claim and present his evidence, and gives to that evidence just the same effect as if the matter were set up in the bill. In this instance the company was made a formal party. Even if it were not so, I doubt not but that the company would have been barred of its demand had it not presented it in the case, because section 9 of that chapter so operates. For stronger reasons would it have been so barred, as it was made a party and its claim presented to the court. If it would be a bar on one side, it ought to be also on the other. The answer of the company set up its demand as arising out of that agreement with full definiteness for compensation for the maintenance of the dams for four years at seventy-five dollars per year. Much evidence was taken on both sides upon the question whether the company was entitled to that compensation. Depositions were taken on the side of the estate to show that the company had not maintained the dam of the requisite height to give sufficient water to the grist-mill, and had not been maintained in the manner demanded by the written agreement; and depositions were taken by the company to repel this charge and to show that the agreement had been complied fully. Thus, a specific controversy arose before the commissioner. It is true this controversy was not made by formal issue in pleading; that is never done or very rare in such a suit; but the bill, the answer, the depositions show what that controversy was. The company demanded three hundred dollars for maintaining the dam, and the estate sought by recoupment to entirely or partially defeat the de-

mand by reason of the breach of the agreement by the company. There could be no other issue. The commissioner rejected the company's debt. Why? Only because he thought the contract had not been complied with by the company. There could be no other reason, since the contract provided that Hurxthal was to pay a fixed amount, and there was no claim of payment, and nothing could defeat the demand under the facts shown, but breach of the agreement. If the company complied with its contract, it was entitled to its debt; if it had not, then its demand would be defeated by recoupment in whole or in part. The court held the company entitled to its full demand, and thus inevitably decided that there was no cause based on the company's failure to comply with its agreement to deny its demand. The estate could have omitted to make defense by recoupment and have ⁹⁶ sued in an action of law, and the decree then would not have bound the estate; but it presented this defense and took much evidence to sustain it. The matter was fully litigated and passed on by the court. Is the matter after long litigation in that suit again open? That decree settled that the dams had been maintained and repaired at the height and in the manner required by the agreement, and that it had not been violated up to the death of Ben Hurxthal. The plaintiff, as a privy in estate under him, is bound by this decree as showing that there was no default or violation of the agreement before Hurxthal's death. The plaintiff must prove a breach later, not a mere continuance of the state of things before his death.

It is contended that the declaration seeks damages including time during Hurxthal's life; but I construe it as claiming damages only accruing during the plaintiff's ownership. I do not think there was any call for a new assignment of damages during plaintiff's ownership. The declaration is limited to the plaintiff's ownership. I therefore think that the defendant's instructions 4 and 5 saying that said adjudication precluded the plaintiff from any recovery are bad. That adjudication only applies to Ben Hurxthal's lifetime. It was a contest between his estate and the company. I think that defendant's instruction 6 is bad. It declares that the decree would preclude recovery, unless the evidence showed that there was some failure of the defendant to keep the covenant which did not exist when the evidence was taken in the chancery case, but which occurred afterward. The objection to this instruction is that it goes back only as far as the taking of evidence, instead of the date of Hurxthal's death. If there was a breach

after his death which entailed damage on the plaintiff after she became owner, she could sue. Defendant's instruction 8 is good, except that it fixes the date of the commissioner's report as the date up to which the decree operates as res judicata, instead of the date of Hurxthal's death.

The plaintiff has given instruction 2, saying that if the plaintiff succeeded to the rights of Ben Hurxthal under the agreement, and that the dam in Greenbrier river was not high enough to give a seven foot head of water as provided in the contract, and that it was not substantially complied with to furnish such head of water, then there was a total breach of the agreement ⁹⁷ in that respect, and "the plaintiff may elect to treat the entire contract as abrogated, and has right to recover whatever damages she has sustained, if any, since March 16, 1899, up to the present time, excluding the time during which Pierpoint and Ammonet had a lease of the mill; also all future damages which they believe must necessarily result from such total breach from the present time down to the end of the five years' renewal of said contract—that is, to June 13, 1904." This instruction is erroneous. It also told the jury that if there had been such total breach they must find for the plaintiff, and in estimating damages must exclude from consideration the plaintiff's evidence tending to show partial breaches occurring since the institution of the action, such as allowing debris to collect against the trestles and the bridge across the race, and leaving open the gates at the foot of the log pond. This material instruction treated the agreement as an entire contract, and allowed the jury to say that if once broken as to the dams and trash, it was broken in toto and for the whole time of its duration, and that entire or permanent damages for that duration, for the past and future, might be at once recovered. If this be so, then it would follow that the decision in the chancery suit would operate as a complete bar to any recovery. But I do not think so, as I have above stated and limited the operation of the chancery suit. The instruction allows a recovery clear through till the 13th of June, 1904, for damages before and after this commencement of the suit. Such is not the character of this contract. The plaintiff is entitled to only such damages as were actually received from the breach of the agreement. That was error. There may be a recovery of the entire or permanent damages in case of injury permanently and durably affecting the estate in value, and the declaration must show an intent to claim for such permanent injury. Our cases hold that if the cause of injury is in nature permanent, and a

recovery for such injury would confer license of the defendant to continue it, entire damages may be recovered in a single action; but where the cause of injury is not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once a heavy recovery for entire permanent and lasting damage, which the injury might inflict if permanent, the entire damages including future ⁹⁸ damages cannot be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues to inflict damages: *Watts v. Norfolk etc. R. R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 421; *Henry v. Ohio River R. R. Co.*, 40 W. Va. 235, 21 S. E. 863; *Guinn v. Ohio River R. R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Pickens v. Coal River etc. Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400; *Hargreaves v. Kimberly*, 26 W. Va. 787, 27 Am. Rep. 121. It is very plain that injury such as the plaintiff imputes to the defendant in this case is not permanent, inflicting enduring and irremovable damages, but may be recurrent, occasional and in its nature curable by human effort and labor, in the removal of the cause. If the dams were too low in fact or were not repaired, but were leaking, or trash accumulated in the race at the trestle, the injury or damage could be stopped by the use of money and labor. It would not be justice to charge the defendant irretrievably with heavy damage, mulct it at once and for the whole period of the contract with damage before its infliction, as if on the conclusive presumption that the defendant would not, after one recovery, remove the cause of the injury. There could be no recovery in this case for damage arising after the bringing of the suit. If continued, the plaintiff must resort to other actions. For these reasons plaintiff's instruction 3 allowing the jury in estimating damages to consider the difference in rental value of the mill from March 16, 1899, to June 13, 1904, with the dams in the condition in which they were and have been since March 16, 1899, up to the present time, and the rental value for the same period if a dam had been maintained at proper height, is bad. For the same reason plaintiff's instruction 5, allowing a recovery of permanent damages, is also bad. And so is the instruction 6 bad as to clauses 1 and 4 relating to special findings, because they allow the jury to find a total breach of the contract for the whole period of its duration from a prior failure on the part of the defendant to observe it.

The court gave plaintiff her instruction 7, saying that if the plaintiff had negligently permitted gravel and mud to accumulate in the mill-race or had been guilty of any other negligence or act whereby the supply of water to her mill had been diminished, such negligence could only be considered in fixing the amount of damages, and would not excuse the defendant from performing its agreement. This seems to be based on sound law. It is claimed gravel and mud were deposited ⁹⁹ by a drain running into the race in times of heavy rain, and suffered negligently by the plaintiff to remain in the race, and that any failure of full supply of water arose wholly or partly from the impediment to the flow of the water caused by such gravel and mud, and that this wholly exculpates the company from liability. In cases of tort where the plaintiff is chargeable with any contributory negligence it totally forbids recovery; but this does not seem to be the law in cases where a breach of contract is a factor in the production of the injury. In such cases the party contracts to do, or not do, a certain thing, and if he violates his contract and thus causes injury he must answer in damages. If the plaintiff, by negligence in doing what he ought to do to lessen the damages, adds to them, that negligence goes to mitigate damages. "The acts and negligence of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damages. The defendant is liable for the natural and proximate consequences of his violation of contract and of his wrongful acts; but if the plaintiff has rendered these consequences more severe to himself by some voluntary act which it was his duty to refrain from, or if by his neglect to exert himself reasonably to limit the injury and prevent damage, in the case of which the law imposes the duty, and thereby he suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. If he omit to use his opportunities, and does not reasonably exert himself to lessen the damages which may result from the defendant's act, he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power. The measure of his duty in this regard is ordinary care and diligence": 1 Sutherland on Damages, sec. 155. We find in 3 Parsons on Contracts, 189, the

following: "Still it is sometimes difficult to draw the line between what are and what are not the natural consequences of an injury. Always, however, if the consequences of the act complained of have been increased and exaggerated by the act, or the omission to act, of the plaintiff, this addition must be¹⁰⁰ carefully discriminated from those natural consequences of the act of the defendant, for which alone he is responsible. If the plaintiff chooses to make his loss greater than it need have been, he cannot thereby make his claim on the defendant any greater." On page 206 (193) we find this: "But from the elements which make up the actual loss are to be eliminated those causes of loss which spring, not merely from the plaintiff's conduct, but also from his omission to do what he might by reasonable endeavors have done to lessen the loss. . . . A party suing for breach of contract is required to do what he reasonably can, and improve all reasonable opportunity, to lessen the injury and reduce the damages, caused by the breach": *Sherman v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 105, 26 Pac. 717. The same principles will be found in *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232, and *Sullivan v. McMillen*, 37 Fla. 134, 53 Am. St. Rep. 239, 19 South. 340. Are there any cases in which a defendant's breach of contract will be totally excused by reason of the negligence of the plaintiff? There are such cases. If the plaintiff's very act or omission is the prime cause of his damage; if it proceeds from the plaintiff's act breaking his contract and causing the injury, the plaintiff could not recover; but if the defendant breaks his contract and injury follows, the plaintiff may recover notwithstanding his act or omission contributes to continue or enhance the damage. In 2 *Parsons on Contract*. 798 (681), we are told that the application of the law on this subject to the facts is difficult, and it is there laid down that "if the plaintiff's own negligence was an immediate and a principal cause of the injury, without which it probably would not have occurred, it is certain he cannot recover damages. But, though the plaintiff is proved to have been somewhat negligent, and to have contributed to the injury by his negligence, he may nevertheless recover, if he can show gross or far greater negligence on the part of the defendant, and also that this negligence was the principal and proximate cause of the injury. Language is sometimes used from which it might be inferred that if both parties are negligent, and the defendant more so than the plaintiff, the plaintiff should recover. The rule may be

incapable of exact definition. But we think it is not law that if both parties are negligent in a nearly equal degree, but the defendant is, on the whole, the most negligent of the two, ¹⁰¹ the plaintiff shall prevail. To sustain the action, a greater than a merely perceptible difference must exist between the two degrees of negligence." Applying these principles to this case it seems to me that if the defendant did by failure to keep the covenant by some act or omission after the death of Hurxthal, entailing damage to the plaintiff's mill after her purchase, then the defendant would be liable for such actual damage; but that any negligence of the plaintiff in allowing sand, gravel or mud to remain in the race, diminishing the flow of water to the mill can be shown in mitigation of damages. What is attributable to her negligence should be excluded from the damage. Therefore, I think plaintiff's instruction 7 is not objectionable. Defendant's instruction 9 propounds the proposition that the agreement of the 13th of June, 1894, "is based on the assumption that the then existing dam furnished the height of water therein specified and required, and that the same being signed by Ben Hurxthal, the presumption arises that he considered such head of water given by said dams." I do not think this instruction is good, as we cannot say that the execution of the agreement by Hurxthal amounted to the admission put by the instruction. The very object of the agreement moving him to sign it may have been to secure such a dam. Still, we must remember that the adjudication in the chancery suit forecloses the question of height of the dam, and fixes their height according to the contract on the 8th of March, 1898.

Defendant's instruction 10, saying that the decree in the chancery cause shows that the height of the dam was in controversy therein is good under the principles above stated upon that subject.

Defendant's instruction 12 is not good so far as it says that the contract is based on the assumption that the dams existed at its date at the lower end of the log pond then furnished the head of water required by it; but the instruction is good in saying "if the jury believes the said dams then furnished sufficient water, and if the said defendant has maintained said dams to the same height they were on June 13, 1894, and has kept the trash and rubbish from the bridge and trestle across said race, so as not to obstruct the flow of water, and use due diligence in repairing said dams when necessary, they must find ¹⁰² for

the defendant," except as to the date, June 13, 1894, the proper date being March 8, 1898.

Defendant's instruction 13 declares the adjudication in the chancery suit extends to the final decree in May, 1899, after the mandate of the supreme court reached the circuit court. I do not think the instruction good. I think that decree, for the purposes of this case, relates to the date of the death of Hurxthal. I shall say nothing upon the subject of excessiveness of damages in view of a new trial, further than to say that they were assessed on an improper basis and made greatly too large, because they cover the whole time from the plaintiff's purchase down to June 13, 1904. As to what damages the plaintiff suffered, if any, we do not say, nor whether the defendant is guilty of a breach of the contract. These matters are left for the new trial. It is very certain that in an action for a breach of contract the measure is more strictly confined than in cases of tort; the primary and immediate result of the breach are alone to be looked to: Wood's *Mayne on Damages*, p. 14, sec. 12. Punitive damages are confined to torts, and even then damages must be compensatory only as a general rule: *Talbott v. West Virginia Cent. etc. R. R. Co.*, 42 W. Va. 560, 26 S. E. 311; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980. Damages must not go beyond fair compensation for actual loss sustained. They cannot be punitive in action on contracts (3 *Parsons on Contracts*, 179 (169); 8 *Am. & Eng. Ency. of Law*, 632); compensation for actual loss is the test, the standard of damages in actions on contract: 1 *Sutherland on Damages*, secs. 12, 75. Damages for breach of contract in excess of actual compensation are unwarranted and a ground for new trial: *Rowland etc. Co. v. Ross*, 100 Va. 275, 40 S. E. 922; *Dougless v. Ohio River R. R. Co.*, 51 W. Va. 523, 41 S. E. 911. Neither in tort nor contract do damages go beyond such as are the reasonable and probable consequences of the act complained of, except in some cases of tort: *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 909, 41 S. E. 190.

Reversed.

The plaintiff cross-complains that the court erred in allowing the record in the chancery suit, including depositions of witnesses, to go in evidence; but, as shown above, it was admissible.

The evidence of John Briscoll, a shareholder in the defendant ¹⁰³ company, was not admissible as to any conversation or transaction with Hurxthal; but that part of his evidence was

excluded and disclaimed by the defendant. I do not see that any conversation between Briscoll and Bailey as to leveling estimates of the height necessary to build the dam before it was built can be admitted. But I do not see any objection to evidence that leveling was done by Bailey.

I do not think, under principles above stated, that defendant's instruction given by the court is objectionable. It declared that the record in the chancery case shows that the height of the dam was in controversy, and was the matter in issue between the estate of Hurxthal and the company.

The plaintiff complains of the action of the court in admitting as evidence minutes of the defendant company in 1881, to show Ben Hurxthal's connection with the company at that time, and that the stockholders of the company claim under Ben Hurxthal, and to show his acquaintance with the business and properties of the company, the minutes being in his handwriting. Hurxthal had parted with all interest in the company before the dam was built and before the agreement, and I do not see that this evidence is relevant to the case or relates to it with sufficient closeness to authorize its admission.

We therefore reverse the judgment, set aside the verdict, and I grant a new trial and remand the case.

Covenants to Maintain Dams and keep them in repair run with the land: See the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 673, on what covenants run with the land.

If an Injury is permanent, a single recovery may be had for the whole damage resulting; but if an injury is temporary in character, a recovery can be had only for the damages sustained up to the time of the commencement of the action, and successive actions may be brought as further damages accrue: *Bowers v. Mississippi etc. Boom Co.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395, and cases cited in the cross-reference note thereto. See, too, *Doran v. Seattle*, 24 Wash. 12, 85 Am. St. Rep. 948, 64 Pac. 230.

One Suing for a Breach of Contract is required to do what he reasonably can to lessen the injury and reduce the damages: *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717; *Wright v. Bank*, 110 N. Y. 237, 6 Am. St. Rep. 356, 18 N. E. 79; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232. That the negligence of the insured does not bar his right to recover on a policy of fire insurance, see *Wertheimer-Swarts Shoe Co. v. United States Casualty Co.*, 172 Mo. 135, 95 Am. St. Rep. 500, 72 S. W. 635.

YOUNG v. SEHON.

[53 W. Va. 127, 44 S. E. 136.]

NEGOTIABLE INSTRUMENTS—Indorsement.—Parol Evidence is Admissible, as between the immediate parties, to show the circumstances under, and the time at which a negotiable instrument was made. (p. 972.)

NEGOTIABLE INSTRUMENTS — Indorsements — Special Agreement Between the Parties.—Any agreement between the parties to a note bearing an irregular indorsement as to the extent of their liability may be shown by parol evidence, and may be enforced as to all who are parties to the agreement. (p. 972.)

BILLS AND NOTES—Non-negotiable—Liability of Indorsers, When Collateral to that of the Maker.—If a non-negotiable promissory note is indorsed first by the payee and next by another person, the undertaking on the part of the indorsers is presumed to be collateral to, and not joint with, the maker. (p. 973.)

BILLS AND NOTES—Non-negotiable Paper—Parol Evidence to Vary.—The rule against the admission of parol evidence to show the consideration, the relation of the parties, and the circumstances attending the execution of the paper, to the end that the true intent of the parties may be ascertained and effected, is not applicable to non-negotiable paper. (p. 983.)

BILLS AND NOTES—Non-negotiable—Maker and Indorsers —Parol Evidence to Show Respective Liabilities of.—If a non-negotiable promissory note is indorsed by the promisee and another in such manner as would make them first and second indorsers if the note were negotiable paper, evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note. (p. 984.)

BILLS AND NOTES—Non-negotiable—Maker and Indorsers —When Liable as Joint Parties.—Where a non-negotiable promissory note is drawn up by one person purporting to be payable to another, and is by the latter and another signed on the back as if they were first and second indorsers, for the purpose of procuring moneys for the benefit of the maker, the indorsement being to give him credit with such person as might accept it and furnish money upon it, the person so furnishing money may elect to hold all the parties as joint promisors, or to treat the indorsers as guarantors. (p. 985.)

Action by Sarah F. Young against Columbus Sehon, J. P. R. B. Smith, and J. N. Camden upon a promissory note which, according to the laws of West Virginia, was non-negotiable because made payable to an unincorporated bank.

John W. English and Rankin Wiley, for the plaintiff in error.

C. E. Hogg and J. U. Meyers, for the defendant in error.

128 **POFFENBARGER, J.** J. N. Camden and J. P. R. B. Smith complain, on a writ of error, of a judgment rendered against them in the circuit court of Mason county, and in favor

of Sarah F. Young, on a non-negotiable promissory note for one thousand dollars, payable one year after date to the order of said Smith, dated December 12, 1893, and signed on the face thereof by C. Sehon, and on the back thereof, first by J. P. R. B. Smith and then by J. N. Camden.

The trial was by the court in lieu of a jury, and the oral evidence consisted of the testimony of said Smith and James L. Knight. The former testified that the note had been mailed to him from Huntington by Sehon, fully made out with the request that he indorse it, and write a letter to Camden asking him to indorse it, which was done. Upon the return of the note by Camden, Smith took it and went to Knight for the purpose of obtaining the money on it for Sehon. Knight testified that he had in his hands, for the purpose of loaning it, eight hundred and fifty dollars belonging to Mrs. Young, the plaintiff, to which he added one hundred and fifty dollars of his own money, took the note and delivered to Smith his check for one thousand dollars, payable to Sehon, which was sent to him by Smith; and that afterward, on the repayment by Mrs. Young of the one hundred and fifty dollars, he delivered the note to her.

The action was assumpsit against Sehon, Smith and Camden, treating Smith and Camden as original promisors with Sehon for his accommodation and to enable him to obtain upon the note said loan. Plaintiffs in error plead nonassumpsit, and Sehon interposed a special plea, setting up his discharge in bankruptcy, and judgment was rendered against the plaintiffs in error only.

Against this judgment it is urged by the attorney for Smith that plaintiffs in error, by placing their names on the back of the note, became guarantors and could not be sued jointly with the principal debtor, the contract of guaranty being collateral and binding the guarantor only in the event of the failure of the party owing the debt to pay it and the exercise of due diligence on the ¹²⁹ part of the holder to collect from him. For Camden it is contended that he and Smith become indorsers or guarantors in the order in which their names are signed on the back of the note.

In the absence of any parol evidence, the note indicates that it was made by Sehon to Smith by whom it was assigned to Camden. Was parol evidence admissible to show the relation of the parties to the note? "Whatever diversities of interpre-

tation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third party on the back of a note payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most instances is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction": Mr. Justice Clifford, in *Rey v. Simpson*, 22 How. (U. S.) 341, 349. In the syllabus of that case it is held that the weight of authority is in harmony with the principle that parol proof of the circumstances under which such indorsement was made is admissible. In 4 American and English Encyclopedia of Law, second edition, 488, it is said that: "In all the states, it would seem, however, that, between the immediate parties, evidence is admissible to show the exact time of indorsement." There can be no doubt that parol evidence was admitted for that purpose in *Kearnes v. Montgomery*, 4 W. Va. 29, *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571, *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197, *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878, *Goff v. Miller*, 41 W. Va. 683, 56 Am. St. Rep. 889, 24 S. E. 643, *Roanoke Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, and *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512. The report of the case in *Bank of Huntington v. Hysell*, 22 W. Va. 142, indicates that no parol evidence was offered in that case. In *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, the parol evidence offered to establish facts fixing upon one of the parties to the note liability as an original promisor was excluded because of the incompetency of the witness to testify against the alleged copromisor, he being dead, and the transactions to which the witness proposed to testify having been personal between them. Such is the rule in Virginia, also: *Hopkins v. Richardson*, 9 Gratt. 485; *Welsh v. Ebersole*, 75 Va. 130 651. This doctrine is so well settled that it is useless to cite authority upon it, but the following may be consulted as leading cases on the subject, all holding that parol evidence is admissible for such purpose: *Good v. Martin*, 95 U. S. 90; *Carazos v. Trevino*, 6 Wall. 773; *Hopkins v. Leek*, 12 Wend. (N. Y.) 105; *Essex Co. v. Edmunds*, 12 Gray (Mass.), 273, 71

Am. Dec. 758; Hall v. Cazenove, 4 East, 477; Cooper v. Robinson, 10 Mees. & W. 694.

Moreover, it is well settled by the decisions of this court, as well as by those of the courts generally, that any agreement between the parties to a note bearing irregular indorsements, as to the extent of their liability on the note, may be shown by parol evidence and will be enforced as to all who are parties to the agreement: Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; Miller v. Clendenin, 42 W. Va. 416, 26 S. E. 512; Burton v. Hansford, 10 W. Va. 470, 481, 27 Am. Rep. 571; Watson v. Hurt, 6 Gratt. 631; Roanoke v. Watkins, 41 W. Va. 787, 24 S. E. 612.

Before attempting to ascertain the law applicable to this case, it is proper to state that the facts upon which this judgment is predicated differ somewhat from those of other cases which have been decided by the court, in which the maker and indorsers have all been held liable as copromisors. In those cases, the indorsements were made before the notes were indorsed by the payee. Here, the note itself imports, and the evidence shows, that the payee indorsed first. In the absence of parol evidence, showing a different agreement or facts from which the law would raise a different obligation, the undertaking on the part of Smith and Camden would be collateral and not joint with Sehon: Quarrier v. Quarrier, 36 W. Va. 310, 15 S. E. 154. In Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571, Miller v. Clendenin, 42 W. Va. 416, 26 S. E. 512, Long v. Campbell, 37 W. Va. 665, 17 S. E. 197, and Roanoke v. Watkins, 41 W. Va. 787, 24 S. E. 612, in all of which the indorsers were held to be copromisors, the third parties indorsed before the payee did so. In most, if not all, of them, the payees became the holders of the notes for value and did not indorse at all.

In each of these cases, the paper itself disclosed the irregularity of the indorsements on the back. Being in the hands of the payee as holder for value, and without his indorsement on the back of it, the theory of successive indorsements or assignments, corresponding to the positions of the names on the back of it, was negatived by mere inspection of the instrument; and upon a showing by parol evidence, that the indorsements¹⁸¹ were made before delivery, the law holds that the indorser is prima facie an original promisor or guarantor, as the payee may elect, on the legal presumption that one who indorses, at the time it is made, a note not made payable to him, thereby

indicates an intention to bind himself for the payment of it in some form, and that, if in such case, he has failed to indicate in what form he intends to bind himself, it is fair to presume that he intended to be bound in any manner that the payee might elect. The necessity for the admission of parol evidence, where the instrument itself shows the irregularity of the indorsements, is apparent. Here, however, the positions of the names on the paper indicate that Schon executed his note to Smith and that Smith assigned it to Camden, and Mrs. Young comes forward, claiming to have acquired it for a valuable consideration. If she had shown that she had given Camden the money on it, without more, his undertaking would have been collateral.

No irregularity of indorsement being disclosed by the paper itself, the question is whether such irregularity may be shown by parol evidence, so as to let in further evidence of that kind to show the intention of the parties. While this is not affirmed in the case of *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, cited, the opinion of the court intimates in the following language, that it may be done: "If these be the facts, Quarrier might be liable for the note as joint promisor or guarantor, according to the time of his signing or understanding between the parties." In *Whitehouse v. Hanson*, 42 N. H. 9, Bell, C. J., said: "It is a presumption of law that the parties to a promissory note stand to each other in the relation in which the signatures appear. The signers on the face of the paper are taken to be joint principals, unless some are designated as sureties; and the signers on the back to be indorsers, in the order in which the names are written, if nothing in the terms of the indorsements indicate the contrary. In the case of a bona fide holder of such a note, without notice, this presumption is conclusive. But, generally, this presumption is not conclusive as to others, but is merely a prima facie presumption, which stands till the contrary is proved." For the assertion that the presumption is conclusive as to bona fide holder, without notice, he cites *Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414, and *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706. Both of these ¹⁸²² cases hold that the presumption in favor of such holder against agreements and equities among the makers and indorsers, of which the holder had no notice, and which, if enforced, would be prejudicial to him, is conclusive. *Whitehouse v. Hanson*, 42 N. H. 9, presented the same question and it was

disposed of in the same way. Hence, there is no ground for an inference that the language quoted means that the holder cannot show by parol evidence the actual nature of the transaction, as to consideration, time and intent, to the extent of making the parties liable to him in a manner different from that indicated by the mere positions of the names on the paper.

Speaking of the operation upon negotiable instruments, of the rule against the admissibility of parol evidence to vary the terms of a written contract, Daniel on Negotiable Instruments, section 720, says: "The language of the rule implies its limitations, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original or present validity of the indorsement on the ground of fraud. There are three classes of cases in which evidence for this purpose is admissible, and it will be seen that it does not contradict or vary the contract imported by the indorsement, but impeaches it as a valid indorsement to the extent claimed by the indorsee. Thus, firstly, it may be shown that the indorsement was without consideration, as for instance that it was for the indorsee's accommodation, or merely to transfer the legal title to the indorsee, he being in fact the owner of the paper; or that it was indorsed for collection, where the form of indorsement does not show that fact, or that it was indorsed merely to perfect an arrangement between the maker and indorsee. And where several successive indorsers agreed to be liable as joint indorsers and cosureties, an extension of this principle would admit the facts to be shown, as they reveal the extent and nature of the consideration."

Section 707 of the same work says: "There is no doubt that, if a note be made payable to the order of the payee, and is indorsed by him, that his liability will be that of an indorser, and not that of a maker. If subsequent to his name, there appears the name of another person indorsed upon it, such person cannot be regarded in any other light than as an indorser, and no parol evidence will be admissible, as against a bona fide ¹⁸³ holder without notice, to show that he intended to bind himself in a different character. This view of the law rests upon the fact that there is no ambiguity in the position of his name, and none in his relation to subsequent parties to the instrument. Upon its face the instrument evidences that he intended to bind himself as an indorser, for it purports to have been regularly transferred to him by the payee's indorsement,

and by him transferred, by his own indorsement, to the indorsee. And unless he has intimated an intention to become liable as a surety or guarantor, by some expression to that effect, he will very clearly be bound as an indorser, and be entitled to require demand and notice as a condition precedent to his determinate liability. The form of the contract must at least *prima facie* determine its construction."

Then section 707b says: "If a party not the payee, at the inception of the note puts his name on the back of it, and the payee afterward indorse it over such party's name, the latter will then be second indorser, and his liability cannot be varied by parol evidence. And the like result is reached if the payee's name be left blank, and the holder of the note, in negotiating it, fills it up with the name of the party who has signed his name on the back."

On the subject of irregular indorsements, such as were found in the case of *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571, *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197, *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512, and *Roanoke v. Watkins*, 41 W. Va. 787, 24 S. E. 612, the same author says, at sections 709, 710 and 711: "When a note is made payable to the order of the payee, and the name of another appears indorsed in blank upon it, and was indorsed before the note was delivered to, or indorsed by, the payee, a very different question, and one upon which the authorities are very much at issue, arises. In such cases such person does not appear upon the face of the paper to have held, and to have transferred the title, but rather to have placed his name upon its back to add strength and credit to it, and thus render it more easy of circulation; and the inquiry is presented whether he intended to bind himself for its payment as a joint maker or surety, as a guarantor, or only as an indorser, whose liability can only be fixed by due demand and notice. If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such ¹³⁴ thing as an 'indorsement,' in its strict and proper commercial sense, of any other than negotiable paper."

"When the note is negotiable the question is by no means capable of such easy and satisfactory solution; but whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the in-

terpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the person who places his name on the back of the note before the payee intended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an absolute promisor to the payee. If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor. And if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee."

"The ground upon which parol proof of intention and agreement in such cases is admitted is that the position of the name upon the paper is one of ambiguity in itself—that it is not a complete contract as is the case of an indorsement by the payee, which imports a distinct and certain liability; but rather evidence of authority to write over it with the contract that was entered into; and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties."

An exception is admitted by Mr. Daniel at section 703, where he says that: "When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint, obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement aliunde different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such ¹³⁵ agreement is proved, the indorsers are not bound to contribution among themselves, but each and all are liable to those who succeed them." On this proposition, he cites *Hogue v. Davis*, 8 Gratt. 4; *Bank of United States v. Beirne*, 1 Gratt. 265, 42 Am. Dec. 551; *Farmers' Bank v. Vanmeter*, 4 Rand. 553; *Chalmers v. McCurdo*, 5 Munf. 252, 7 Am. Dec. 684, and numerous other cases, which bear out fully the text. A contrary doctrine is asserted in *Stovall v. Border Grange Bank*, 78 Va. 194, but the declaration is obiter.

While the rule excluding parol evidence to show liability of indorsers different in extent or character from that indicated by the positions of their names, is well supported by decisions of the courts of New York, Illinois, Minnesota, North Carolina, Indiana, Massachusetts, Missouri, Texas, Tennessee and Rhode Island there is a vast amount of authority against it. Randolph on Commercial Paper, at section 834, says: "This show of intention seems, however, to conflict with the fact that such signature is generally made for the further assurance of the payee, whereas his position as indorser is naturally after the payee or first holder, and tends to negative all idea of liability to the payee"; and then says the view is "approved as 'the New York rule' by Judge Daniel." At section 838, Randolph on Commercial Paper cites a long list of cases holding that, where the paper discloses no ambiguity on its face, parol evidence of the time of the indorsement and the consideration may be introduced. One of these, *Sturtevant v. Randall*, 53 Me. 149, holds that: "The contract implied from one's placing his name in blank upon the back of a negotiable promissory note is not a written contract so far complete in itself as to exclude parol evidence to show his connection with such note. As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character." In the opinion, Barrows, J., says: "From a series of decisions in Massachusetts and this state, it may be deduced as settled law that when one, not the payee of a negotiable promissory note, indorses it on the back, at its inception, the legal presumption arising from the act is that it was done for the same consideration with the written contract on the face of the note, and the person thus indorsing will be holden as a surety and an original promisor; if the same act is done at some subsequent time, but without a previous indorsement ¹³⁶ by the payee, there is no presumption as to the consideration, and the person thus indorsing will be held, if there was in fact a consideration for his contract, as guarantor; if the same blank indorsement is made after an indorsement by the payee, then the person making it is to be regarded as a subsequent indorser; and, in the absence of date or proof, it is presumed that the indorsement was made at the inception. Now, that these presumptions have not been considered, as between all the parties to negotiable paper, to belong to that class of legal presumptions which admit of no opposing evidence, is

manifest from the tenor of the reasoning in many of the cases above referred to." Then, after quoting from two Massachusetts cases, he says: "But, aside from numerous dicta of similar import, it is too plain to need elucidation that in such cases parol evidence must be resorted to, in the absence of anything in writing to determine what the contract actually was, whether that of an original promisor, guarantor, or indorser, to transfer the title, and that this is no infringement of the wholesome rule that parol evidence shall never be received to vary or contradict a written contract."

Another case affirming with equal strength the like doctrine is *National Bank v. Dorset Marble Co.*, 61 Vt. 106, 17 Atl. 42, decided in 1888. Rowell, J., delivering the opinion of the court, said: "But in this state no distinction has ever been made in this behalf between regular and irregular indorsements in blank of third persons, but they have alike been held, prima facie, to impose the obligation of maker. In most, if not all, of the cases before *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the indorsements were irregular, which brings the cases in line with a great majority of the cases in other jurisdictions. But in *Sylvester v. Downer* the defendant's indorsement was irregular, that is, his name was written in blank under the names of the payees. This seems to be so from the case, but we have a copy of the note before us, which shows it to be so. Downer was sued as sole maker of the note, and although it is true that the evidence tended to show, and the jury found, that he intended to assume an unconditional obligation to pay the note according to its tenor, yet the court adverted to that fact only as putting at rest all pretense that it was not understood that he assumed the obligation his signature imported, and said: On being produced, ¹³⁷ the note shows the name of the defendant indorsed upon it, and also the names of the payees. This, according to the decisions of this court, repeatedly made, imposes upon the defendant the obligation of maker, with this difference, that his undertaking being in blank, as between him and the parties to it, it is susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing": See, also, *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, decided in 1892.

Chaddock v. Vanness, 35 N. J. L. 517, 10 Am. Rep. 256, asserts with emphasis, the doctrine of the Maine and Vermont courts. Depue, J., said: "The admissibility of parol evidence

to vary the legal import of commercial paper is forcibly advocated by Professor Parsons: 2 Parsons on Notes, 520. He maintains that its competency is limited to exceptional cases: 2 Parsons on Notes, 23. The exceptional cases are those in which the evidence tends to establish a defect in the consideration, or the instrument is informal, and therefore no commercial contract is created by the indorsement per se. It is upon the principle of this exception that the evidence received by the court in this case was properly admitted. The defendant is not named in the note or as payee. The first indorsement of a note by a person not the payee per se creates no implied or commercial contract whatever, although the party may be subjected to the liability of a second indorser if the payee should afterward indorse the note, and it should come to the hands of a bona fide holder before maturity: *Crozer v. Chambers*, 20 N. J. L. 256. As between the parties, a liability can arise only from the facts and circumstances which occurred at the time of the transaction. Whether any contract was made, and what the character of the contract is, must be determined by the intentions of the parties as ascertained by parol evidence of the circumstances under which the indorsement was made. Parol evidence offered for that purpose is not objectionable on account of a tendency to vary a written contract, when no contract arises except upon such evidence": See, also, *Hayden v. Weldon*, 43 N. J. L. 128, 39 Am. Rep. 551. But *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580, holds that: "An accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint, and not a successive, liability." So ¹³⁸ in *Foley v. Brewing Co.*, 61 N. J. L. 428, 39 Atl. 650, a payee who had indorsed a note for the accommodation of the maker before it was delivered to the holder, was held to be a commercial indorser, just as the paper indicated.

Cecil v. Mix, 6 Ind. 478, opened wide the door for parol evidence, but the supreme court of that state long ago adopted the New York rule: *Vore v. Hurst*, 13 Ind. 551, 74 Am. Dec. 268; *Roberts v. Masters*, 40 Ind. 463. So in Minnesota, it was one held that: "Parol evidence is admissible to prove in what capacity a party writes his name on the back of a note—whether as indorser, guarantor or surety, when the controversy is between the original parties, or to determine the mutual lia-

bility of the indorser when there are several": *Pierse v. Irvine*, 1 Minn. 369. But in *Coon v. Pruden*, 25 Minn. 105, the court held that: "A member of a firm made a promissory note, payable to the order of the firm. Held, that the relation of the firm to the note is that of indorser, and cannot be varied by parol, and that a demand upon the maker is necessary to charge the firm."

Counsel for defendants in error cite certain Ohio cases which they claim sustain their position. Among them is *Douglass v. Waddle*, 1 Ohio, 191, 13 Am. Dec. 630, holding, upon evidence of mere local usage, admitted that accommodation indorsers of a promissory note are cosureties, among whom contribution may be enforced. This was narrowed and virtually overruled in *Williams v. Bosson*, 11 Ohio, 62, but it affirms the admissibility of parol evidence. Another is *Robinson v. Abell*, 17 Ohio, 36, holding, upon a note executed by John W. Abell to William Robinson against Palmer as a joint maker, that there could be no recovery against Palmer as maker without proof that the indorsement was made at the time of the execution of the note. This asserts the admissibility of parol evidence, but the court virtually certifies in its decision that the irregularity of the indorsement was apparent without the aid of extrinsic evidence, and that it would let in parol evidence anywhere. In the syllabus, Palmer is described as a stranger to the note. Another is *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719, 45 N. E. 1094, holding that the indorsement of the maker's name on the back of a promissory note payable to his own order, and its delivery in that form to another for value, are essential parts of the execution ¹³⁹ of the note, and that the person so making, indorsing and delivering for value is liable as maker. But the court held that the irregularity of the indorsement was disclosed by the note itself. Williams, C. J., said: "The note being payable to the order of the maker was incomplete in its execution until indorsed by him and delivered for value. . . . There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it in order to transfer the title." Another is *Seymour v. Mickey*, 15 Ohio St. 515, in which it was permitted to be shown by parol evidence in a suit upon a note bearing regular indorsements, that an indorser signed his name on the back of the note, at the time of its execution, for the purpose of giving the payees additional security

for the payment of the note, and had refused to sign it as a joint maker, whereupon he was held to be liable as an indorser and entitled to demand notice. This case does not appear to have ever been expressly overruled, although, in *Cummings v. Kent*, 44 Ohio St. 92, 58 Am. Rep. 796, 4 N. E. 710, it has since been held that: "Evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not liable as such, is inadmissible." The proof offered was that there was a parol agreement that the drawer was not to be liable as such.

Enough has been said to clearly show that, if the case were governed by the rules applicable to negotiable paper, there is respectable authority for deciding the case either way, but the weight of authority would undoubtedly make it impossible to hold the plaintiffs in error liable as joint makers of the note, in the present status of the case. But the note is not negotiable, and the inquiry now is whether a different rule applies, and, if so, what that rule is. Section 1 of Daniel on Negotiable Instruments draws a very clear distinction between the two classes of paper. In the third clause of which it is said: "By the common law, an instrument under seal imports a consideration, by virtue of the solemn ceremony of its execution; and no other non-negotiable instrument does. A bill of exchange, however, by the usages of merchants, also *prima facie* imports a consideration; and now by statute promissory notes of a certain kind are placed on the same footing. As between immediate parties, the true state of the case may be shown, and the ¹⁴⁰ presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a bona fide holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosoever hands it may go." In the first cause of said section he shows that a negotiable instrument is a *res*, a thing of value, title to which may be held and transferred, and that when it goes into the hands of a bona fide holder without notice of any defect, he may hold it against the world, while in the case of a non-negotiable instrument the true owner may identify it and reclaim it from anybody who may hold it as an innocent purchaser from one who has stolen it or otherwise come into possession of it wrongfully.

Edwards on Bills and Notes, at section 326, says: "There is, however, a manifest distinction between those cases in which the party has made a valid and explicit contract, as where a person writes his name on the back of a negotiable note, and that class of cases where the contract cannot be carried into effect as an indorsement, according to mercantile usage, as where a person indorses his name on the back of a note that is not negotiable. In respect to the former, the contract is to be enforced according to its legal effect, under principles that are well established, and presumed to be within the knowledge of the parties; while in respect to the latter, courts endeavor to prevent the utter failure of the contract, by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note." Section 391 of the same book, says: "Where a person puts his name, in blank, on the back of a promissory note, he may be held liable as maker or guarantor, when there is an agreement to that effect, and when he cannot be charged as an indorser, as in the case of a non-negotiable note. But, where the payee seeks to charge the indorser of a non-negotiable note, who indorsed the same before delivery, with the payment thereof, he must allege that the defendant indorsed with intent to become liable as guarantor or maker. This is allowed in order to prevent an entire failure of the contract, on the principle *ut res magis valeat quam pereat*."

141 2 Parsons on Notes and Bills, 125, says: "In those states where the rule is adopted that a third person indorsing paper in blank before the delivery of it to the payee is liable as an indorser only, it is not applied in case the paper be not negotiable, inasmuch as a legal indorsement can only be made on negotiable paper; but the indorser in such case is held liable as a maker or guarantor."

These authorities clearly show that the rule against the admission of parol evidence to show the consideration, the relation of the parties and the circumstances attending the execution of the paper, to the end that the true intent may be ascertained and effectuated, has no application in the case of non-negotiable paper. This being true, the rule of liability pronounced by the law must be the same in this case as it is in the case of irregular indorsements, decided by this court and to which reference has been made. In those cases it has been

decided that the holder of the paper may treat the parties thereto either as makers or as guarantors, according to his own election, however their names may stand upon the paper. To this, it may be objected that the rule excluding parol evidence, when the names upon the paper are signed regularly and in succession, rests upon the ground that it operates to vary or contradict the terms of a written contract, and that this paper imports a debt due from Sehon to Smith, transferred by Smith to Camden, and that Mrs. Young stands in the attitude of assignee of Camden, and that, therefore, she must hold Smith and Camden as guarantors of the debt due from Sehon only, and was bound to the exercise of diligence to collect that debt. This contention is not without the semblance of reason, to say the least, but it has just been shown that the indorsements of such note are not regarded as importing a complete contract and that evidence is admissible to show the intention of the parties: *Edwards on Bills and Notes*, sec. 391. In some instances it has been held that the indorser is to be treated as a guarantor, and not as a maker, but the rule applied by this court in the cases in which parol evidence has been admitted, entitles the holder of the paper to elect whether he will treat them as makers or guarantors. If there had been an agreement between Sehon, on the one side, and Smith and Camden on the other, that the latter should be¹⁴² guarantors, or that Smith was to be guarantor as to Sehon, and Camden guarantor as to both Smith and Sehon, such agreement would be unavailing as against Mrs. Young, unless she had notice of it: *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Burton v. Hansford*, 10 W. Va. 481, 27 Am. Rep. 571; *Watson v. Hurt*, 6 Gratt. 633. There is no evidence that there was such an agreement, unless the note itself is evidence of it. It cannot be, for it is not commercial paper, and is not regarded in law as imposing liabilities or contracts, according to the order of indorsement. Smith testified in the case and did not say there was such an agreement. Camden did not come forward to testify. The evidence shows circumstances from which it is clear that this note was drawn up in the form in which it is for the purpose of procuring money from somebody for the benefit of Sehon, and that the names of Smith and Camden were affixed to it with the intent to give it credit and strength with the person who should accept it and furnish the money upon it. That clearly makes them liable as joint promisors.

Defendant in error had the right of election to hold them as original promisors or as guarantors.

For these reasons, the judgment must be affirmed.

LIABILITY OF INDORSER OF NON-NEGOTIABLE INSTRUMENT.

- I. Indorsement before Delivery.**
 - a. Liability as Maker or Guarantor.
 - b. Qualified Liability.
- II. Indorsement in Blank.**
 - a. Authority to Fill.
 - b. Liability of Indorser.
- III. Indorsement by Payee.**
- IV. Diligence Required against Indorser.**
- V. Statute of Limitations.**

I. Indorsement Before Delivery.

a. **Liability as Maker or Guarantor.**—Speaking in a strictly legal sense, there can be no such thing as the indorsement of a non-negotiable instrument within the meaning of the law-merchant. Indorsement applies strictly to negotiable instruments: *Griswold v. Slocum*, 10 Part. 402.

Although there is some conflict of authority, the general rule is well established that one who writes his name on the back of a non-negotiable note before its delivery, to give it credit, thereby becomes a maker or guarantor, and not an indorser, and is *prima facie* liable on the note upon the default of the principal without previous demand or notice. Such person is liable as a guarantor or maker of the note, and is not entitled to have it presented for payment when due, nor to be given notice of its nonpayment: *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94, 29 Pac. 415; *Gist v. Drakley*, 2 Gill, 330, 41 Am. Dec. 426; *Culbertson v. Smith*, 52 Md. 628, 36 Am. Rep. 384; *Seigman v. Hoffacker*, 57 Md. 324; *Lewis v. Harvey*, 18 Mo. 74, 59 Am. Dec. 286; *Cromwell v. Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527; *McMullen v. Rafferty*, 89 N. Y. 456; *Richards v. Warring*, 4 Abb. App. Dec. 47; affirming same case, 39 Bart. 42; *Griswold v. Slocum*, 10 Bart. 402; *Paine v. Noelke*, 54 How. Pr. 333, 11 Jones & S. 176; *Cawley v. Castello*, 15 Hun, 303; *Roe v. Hallett*, 34 Hun, 128; *Barr v. Mitchell*, 7 Or. 346. If a person not a party to a non-negotiable note, indorses it in blank at the time it is made and delivered to the payee, for the purpose of giving original validity and security to the contract, such person is liable upon the note as a joint maker, and his contract is not void under the statute of frauds as being without a consideration expressed: *Houghton v. Ely*, 26 Wis. 181, 7 Am. Rep. 52. No contract of indorsement in a legal sense can be presumed from the position of a person's name upon the back of a non-negotiable note, but as he must have intended to bind himself in some capacity, his contract will be con-

strued to be either that of a comaker or guarantor of the maker. Hence the payee or holder may charge such person as either maker or guarantor according to the actual intention of the person indorsing the note: *New York Security etc. Co. v. Storm*, 81 Hun, 33, 30 N. Y. Supp. 605; *Gorman v. Ketchum*, 33 Wis. 427. One who indorses his name on a non-negotiable note, before its delivery by the maker to the payee, is, in effect, himself a maker of the note, and his name, equally with that of the maker who subscribes it, imports an absolute liability for its payment at maturity: *Paine v. Noelke*, 53 How. Pr. 273. If the instrument indorsed and delivered is non-negotiable, the payee may hold the indorser liable on the original contract as a surety, unless it appears by extrinsic evidence that the intention of the parties was otherwise: *Wells v. Jackson*, 6 Blackf. 40. A person, by indorsing a non-negotiable note, warrants the liability and ability of the maker to pay it, and is bound, if due diligence is used by the holder, to make good his warranty of the maker's ability to pay: *Matchett v. Anderson etc. Works*, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229. If a person assigns a non-negotiable instrument by indorsement and delivery, he impliedly warrants its validity, his right to assign, that it is a subsisting unpaid debt, and the solvency of the debtor. Hence he is a guarantor: *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681. Such indorsement is a promise to pay, and not a conditional contract to pay upon demand of, and refusal by the maker: *Peddicord v. Whittam*, 9 Iowa, 471. In respect to the immediate indorsee of the payee, the indorsement ordinarily creates the same liability and obligation as the indorsement of a negotiable note: *First Nat. Bank v. Falkenham*, 94 Cal. 141, 29 Pac. 866. An indorser, intending to become a surety for the maker, may be declared against as an original promisor: *Josselyn v. Ames*, 3 Mass. 274; *Sweetser v. French*, 13 Met. 262. The indorsement may itself be a guaranty to pay the note, as "we guarantee this note": *Peddicord v. Whittam*, 9 Iowa, 471-474. If parties make a non-negotiable note and other persons put their names on the back thereof while it is blank as to the payee's name and to be filled with the name of the person who will furnish money upon it whose name is filled in, and it is delivered to him by one of the makers, he has a right to treat all as original promisors or makers, or some as makers and others as guarantors, as he chooses, and sue them as such, and no agreement that those so indorsing shall be liable only as guarantors, will avail against the payee, unless before delivery of the note, he knows of such understanding: *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

b. **Qualified Liability.**—Some of the cases do not hold the indorser of a non-negotiable instrument to the strict accountability set forth in the foregoing cases. Thus, it has been held that the indorser or assignor of a non-negotiable instrument is not liable on his indorsement: *Lawrence v. Dougherty*, 5 Yerg. 435; and that the

indorser of a paper not negotiable is only liable where he specially contracts to that effect, or where he transfers the paper fraudulently, and in the latter case not upon the indorsement, but by special action for the consideration paid by the indorsee and holder: *Kirkpatrick v. McCullough*, 3 Humph. 171, 39 Am. Dec. 158; *Whiteman v. Childress*, 6 Humph. 303. The indorser is sometimes exempted from liability by the statute. Thus, an indorser and assignor of such a note is not liable unless it is shown that the maker was insolvent at the time the note fell due, or at the time of its assignment, or that due diligence has been exercised against the maker without recovery, or that by the use of due diligence the money could not have been recovered: *Nichols v. Porter*, 2 W. Va. 13, 94 Am. Dec. 501. The indorser of an instrument not negotiable is not liable to an action thereon on the ground of the insolvency of the maker, where his indorsement is only a transfer of his interest and contains no warranty of the maker's solvency: *Todd v. Twitty*, 1 Nott & McC. 261.

II. Indorsement in Blank.

a. **Authority to Fill.**—As before stated, if a third person writes his name in blank on the back of a non-negotiable instrument before its delivery to the payee, he thereby becomes liable as a maker, and the payee may write over such signature a promise to pay the money named therein to the payee: *Barr v. Mitchell*, 7 Or. 346. The indorsement of such an instrument, to enable the obligor to negotiate it and to raise money thereon, authorizes the holder to fill in the blank above the indorsement with a promise to pay in case of the default of the obligor and the liability of such an indorser is that of an original promisor: *Gist v. Drakely*, 2 Gill, 330, 41 Am. Dec. 426. The indorsee of a note not negotiable, for a valuable consideration, may write over the name of the indorser a promise to pay the contents of the note to the indorsee, who may maintain an action upon such promise against such indorser: *Josselyn v. Ames*, 3 Mass. 274; *Sweetser v. French*, 13 Met. 262. A non-negotiable instrument indorsed in blank passes by delivery, and the holder may, after bringing suit, fill up the indorsement with a special assignment to himself: *Lucas v. Pico*, 55 Cal. 126; *Lucas v. Byrne*, 35 Md. 485. The blank indorsement of such paper is a mere authority to the holder to fill it up, but until this is done the legal title is in the payee named: *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119. The rules relative to indorsements in blank under the law-merchant do not apply to non-negotiable instruments. Blank indorsements of the latter only gives the first indorsee the right to fill up such indorsement to himself; it does not authorize a subsequent indorsee to fill up the indorsement in his own name, nor does it authorize the immediate indorsee to fill up the blank with a stranger's name: *Muldrow v. Agnew*, 11 Mo. 616. But the holder of such a note indorsed in blank, may write over the blank indorsement a waiver of demand and notice or anything else which will

render the indorser liable without proof of demand and notice, since such writing does not affect the undertaking of the indorser: *Long v. Smyser*, 3 Iowa, 266.

b. **Liability of Indorser.**—An indorsement in blank of a non-negotiable instrument made by a stranger for the benefit of the payee, implies, in the absence of countervailing proof that such note is due, that the maker shall be able to pay it at maturity, and that it is collectible by due diligence. To this extent the indorser is a guarantor: *Huntington v. Harvey*, 4 Conn. 124; *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52; *Perkins v. Catlin*, 11 Conn. 213, 29 Am. Dec. 282; *Ranson v. Sherwood*, 26 Conn. 437; *Sweetser v. French*, 13 Met. 262. Under these decisions such indorsement does not make the indorser a joint maker, nor an absolute guarantor, liable, at all events, on the dishonor of the note: *Perkins v. Catlin*, 11 Conn. 213, 29 Am. Dec. 282. Nor is the holder entitled to write over the indorsed name an absolute promise, or any special contract, repugnant to the undertaking which the law implies—that of a qualified guarantor: *Huntington v. Harvey*, 4 Conn. 124.

III. Indorsement by Payee.

No particular or settled rule can be laid down as to the liability arising from an indorsement of a non-negotiable note by the payee thereof. In a late case it is announced that in such case the payee is not liable in case of nonpayment by the maker: *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281. It has also been held that if the payee of a sealed note writes his name upon it in blank without more, his indorsement imports merely an assignment of the note and not a guaranty also: *Tryon v. De Hay*, 7 Rich. 12; *Lanneau v. Ervin*, 12 Rich. 31. It has been said that the indorsement by the payee simply makes him liable as an assignor to pay after the exercise of due diligence by the holder, and failing to collect from the maker after suit, or in case of the insolvency of the latter: *Samstag v. Conley*, 64 Mo. 476. The assignor of such a note by indorsement is not liable as a surety, but only as a guarantor at most, and in that capacity he is entitled to notice of the default of the principal debtor: *Sutton v. Owen*, 65 N. C. 123. A sealed instrument, though in the form of a promissory note issued by a bank, is, nevertheless a specialty and non-negotiable, and an indorsement in blank by the payee does not make him liable as an indorser of a negotiable note: *Frevall v. Fitch*, 5 Whart. 325, 34 Am. Dec. 558. A mere indorsement in blank by the payee of a sealed bill does not make him liable as an indorser to the holder, and nothing short of an unequivocal promise to pay will make him liable: *Folwell v. Beaver*, 13 Serg. & R. 311. The assignor of a county warrant by indorsement is not liable to the assignee as an indorser of a negotiable instrument, nor as an indorser of a written obligation to pay money: *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78. It has been held, however, that the indorsement of a non-negotiable note by the

payee, is not an original undertaking between the indorser and the indorsee; that it is collateral, and payment must be demanded and notice be given to the indorser, before he can be held liable: *White v. Low*, 7 Barb. 204; *Parker v. Riddle*, 11 Ohio, 103. The payee of a non-negotiable note, who transfers it by indorsement in blank, does not become liable to the indorsee of his indorsee without an express promise to pay the note: *Kendall v. Parker*, 103 Cal. 319, 42 Am. St. Rep. 117, 37 Pac. 401; *Helfer v. Alden*, 3 Minn. 332. It has been held, however, that the indorsement in blank, by the payee, of a written instrument of the payment of money to himself, or his order, though such instrument is not negotiable by the law-merchant, creates a contract on which the indorser is liable to any subsequent indorser: *Lynch v. Mead*, 99 Iowa, 66, 68 N. W. 579. If the payee assigns a specialty by indorsement with the words, "with recourse," added, he may be held liable on his indorsement: *Kline v. Keiser*, 87 Pa. St. 485. If a payee indorses a non-negotiable note, he must be proceeded against as an indorser and not as a guarantor: *White v. Low*, 7 Barb. 204.

IV. Diligence Required Against Indorser.

The assignee of a non-negotiable instrument must use diligence against the maker in an attempt to collect it in order to hold the assignor liable: *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310. The diligence required of the holder of such an instrument, in order to subject the indorser, consists in a demand for payment from the maker, as soon as the note becomes due, and, in case of nonpayment, an immediate suit against him: *Huntington v. Harvey*, 4 Conn. 124. Such diligence is dispensed with only by the insolvency of the maker, or some other valid reason: *Fulford v. Johnson*, 15 Ala. 385. Suit must generally be brought against the maker of the note at the next succeeding term after it falls due, in order to fix the liability of the indorser: *Matchett v. Anderson etc. Works*, 29 Ind. App. 210, 94 Am. St. Rep. 272, 64 N. E. 229. The mere fact that the maker of the note has a setoff against the payee does not dispense with the necessity for the indorsee to sue to the first term of court after the maturity of the note in order to charge an indorser who is not the payee: *Hagerthy v. Bradford*, 9 Ala. 567. The neglect of the holder to put such note in suit against the maker for four months after its maturity is such laches as, in the absence of any excuse or waiver, will discharge the indorser: *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52. And, of course, such delay for several years is fatal: *Matchett v. Anderson etc. Works*, 29 Ind. App. 210, 94 Am. St. Rep. 272, 64 N. E. 229. If the holder of a non-negotiable note, indorsed in blank, has without excuse, neglected until long after its maturity to bring suit, it is not necessary for the indorser insisting upon the laches of the holder as a discharge from liability, to show that he has sustained actual damage: *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52. A different rule seems to prevail in California, as it has there been held that mere delay of

the payee to proceed against the principal, or to pursue any other remedy, is not available as a defense to one who has put his name on the back of such a note to give it credit: *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94, 29 Pac. 415. We confess our inability to find any legal reason for such a decision.

An indorser already discharged by the laches of the holder of the note does not waive such laches and revive his liability by advising the holder, after the maker's arrest, not to commit him to prison: *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52. If an indorser after discharge, by reason of the holder's laches, takes an assignment from the maker as security for indorsements on the latter's account, and it appears that he is under other liabilities on such maker's account, aside from the indorsement in question, he will not be deemed to have waived the prior laches, so as to revive his liability on the note: *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52. The indorsee of a non-negotiable note is required to use due diligence in order to fix the liability of an indorser thereon, not only in commencing suit and obtaining judgment against the maker, but also in issuing his execution and procuring the proper return thereon, and the mere insolvency of the maker has been held not a sufficient excuse for failing to obtain a return of no property on an execution against him: *Bishop v. Bradford*, 16 Ala. 769. But it has also been held, and we think with better reason, that the total insolvency of the maker of such note, will, as against an indorsee thereof, excuse the holder for failure to bring suit against the maker at maturity: *Prentiss v. Danielson*, 5 Conn. 175, 13 Am. Dec. 52; *Ranson v. Sherwood*, 26 Conn. 437. An indorsee of a note who fails to sue the maker until a year after its maturity, because of a promise of the indorser to stand good for its payment if the maker was not sued, and the indorsee is thereby unable to satisfy a judgment recovered on the note, many maintain an action thereon against such indorser: *Davis v. Leitzman*, 70 Ind. 275; *Galpin v. Hard*, 3 McCord, 394, 15 Am. Dec. 640. If the indorsement on the note waives the bringing of suit at the next term of court, this is an absolute and unconditional waiver of the time of bringing suit against the maker, but the indorsee must, nevertheless, bring suit against the maker before the statute of limitations has effected a bar, and he must prosecute the maker to insolvency: *Walker v. Wigginton*, 50 Ala. 579.

V. Statute of Limitations.

A person who writes his name on the back of a non-negotiable note payable on demand may be treated either as a maker or guarantor, and in either capacity the cause of action against him accrues immediately upon the execution of the note and without demand, and the statute of limitations begins to run in his favor at once, and may be pleaded by him as a defense, if action is commenced against him after the period of limitation has expired: *McMullan v. Rafferty*, 89 N. Y. 456; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681.

FLETCHER v. PARKER.

[53 W. Va. 422, 44 S. E. 422.]

INFANTS—Next Friend, Power of.—A next friend suing on behalf of an infant has no power to settle or compromise a judgment without the express sanction of the court. (pp. 992, 993.)

JUDGMENT—Effect of Dismissal of Writ of Error from.—A Dismissal by Agreement of a writ of error from a judgment does not bar or satisfy the judgment, though made on the suggestion that the matters in difference have been settled. It merely purges or releases the error, leaving the judgment to stand, and does not preclude the plaintiff from insisting that the judgment has not been paid. (p. 994.)

EQUITY—Dismissal on the Merits, When not Proper.—Though a bill in equity is subject to demurrer because of defects therein, yet if the decree is not based alone on such defects and the bill is not dismissed for that cause, but on the merits, and the complainant declines to amend, the appellate court will reverse the decree, at the costs of the appellant, and remand the cause, with leave to amend the bill in the respects in which it was defective, or dismiss the suit without prejudice to the right to bring another action. (p. 994.)

John Osborne and Thompson & Lively, for the appellant.

Miller & Read, for the appellee.

⁴²³ BRANNON, J. Louise Fletcher, an infant, by Frank Lively as her next friend, filed a bill against J. A. Parker in the circuit court of Summers county stating that suing by her next friend, J. R. Fletcher, she had recovered in said court a judgment for seven hundred and fifty dollars against Parker; that Parker obtained from the supreme court a writ of error to the judgment, but before it was passed upon its merits Parker effected a compromise with said next friend Fletcher, by which Fletcher agreed to take two hundred dollars in full payment of the judgment, and that then Parker procured some order to be entered by this court, which was sent down to the circuit court not saying what order nor in fact filing it; that said next friend Fletcher had no right to make such compromise or collect the judgment; that as the plaintiff was an infant she was not bound thereby; that said judgment was yet unpaid. The bill stated that Parker was owner of certain real estate and prayed that the judgment of the supreme court, and that of the circuit court (without saying what it was) pursuant to the order of this court be set aside as invalid, and that the real estate be sold to pay the judgment. Parker demurred to the bill and filed an answer. This answer sets up

that Parker, at the request of said next friend Fletcher, compromised said judgment and that Parker paid Louise Fletcher and J. R. Fletcher two hundred dollars in full settlement and discharge of said judgment and all their claims against him, and they executed a full and final release and discharger and also made an indorsement and release on the margin of the record of the judgment, and executed an order to the circuit court to dismiss the suit. (None was pending.) The answer further set forth that then an order was entered in the supreme court dismissing said writ of error agreed. The order made by the supreme court reads thus as exhibited with the answer: "It appearing to the court by written agreement duly signed by the parties interested in this case, and filed with the papers that the matters and differences herein have been fully settled. And on motion of plaintiff in error by Miller & Read, his ⁴²⁴ attorneys, this case is dismissed agreed at cost of plaintiff in error, except statute fee, which is ordered to be certified to the circuit court of Summers county." The decree of the circuit court recites that the cause was heard on the bill, demurrer, pleas and answer and general replication, and that the court was of opinion that the bill was not good; and sustained the demurrer to it, and the plaintiff not wishing to amend the bill, "the court having decided the merits, and the case being submitted to the court for its decision on the merits upon all the papers and proceedings aforesaid, and the court having considered said case on the merits, and being of opinion that the plaintiff is not entitled to the relief prayed for therein, it is adjudged, ordered and decreed that the plaintiff's bill be dismissed." The plaintiff appeals.

We have a bill plainly bad for the reason that it does not show that execution was returned "no property found," or that two years had passed without execution: *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. And it does not aver that the property sought to be sold would not by rental pay the debt in five years. So, there was no error in sustaining the demurrer.

Does the bill show a sustainable case? That the contract of compromise is not valid to bind the infant against disaffirmance is plain. It operated to her prejudice and can be repudiated by her. She could not compromise: 16 Am. & Eng. Ency. of Law, 286. She thus did not bind herself by her own act. Is the compromise by her next friend binding on her? It is not. "A next friend cannot compound a judgment, nor release nor discharge a cause of action out of court. He has no power to

settle or compromise without the express sanction of the court. But a compromise may be enforced by the court when made for the infant's benefit": 14 Ency. of Pl. & Pr. 1040. In the present case the compromise lost to the infant three-fourths of the judgment. Why should the act of a next friend be binding in this instance? He is not a party, but the infant is the real party to the suit. The next friend is one to prosecute and look after the suit. His duties and powers end with judgment recovered. He cannot receive pay of it; but payment must be made to the regular guardian or to the court: *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344, 14 Ency. of Pl. & Pr. 998, 1037; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429. A compromise ⁴²⁵ by a next friend may be made good, in a suitable case, by the court's approval in the case: *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208. Many cases are cited in 44 L. R. A. 168. But no order of the circuit court appears. It could make none after judgment.

What becomes of the two hundred dollars paid under the compromise? Shall it go to Parker's credit? No, because to allow this we have to affirm that the compromise was valid. We do not have to discuss, in this case, the nice questions as to whether an infant who has sold property or made a contract and elects to disaffirm, must first repay the consideration and place the other party in statu quo. For such discussion see *Mustard v. Wohlford*, 15 Gratt. 343, 76 Am. Dec. 209; *Bailey v. Gillespie*, 12 W. Va. 70, 29 Am. Rep. 445; *Bedinger v. Wharton*, 27 Gratt. 857. It does not appear what has become of the two hundred dollars. The question we have is simply whether an infant or a next friend can compromise and release a judgment and accept payment of the compromise. To make this a partial payment we have to decide that an infant or next friend can collect a debt. Would payment of a note or any other debt to an infant be valid?

What is the effect of the dismissal by this court of the writ of error from the judgment? It is claimed that it is *res judicata*, bars the judgment, satisfies it. We do not think so. In *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199, we held that an order dismissing a case in a court of original jurisdiction is a bar to another suit on the same cause of action. What does a dismissal "agreed" made in the supreme court upon a writ of error to a judgment of a circuit court import? Such a dismissal in any court cannot recover any more than

is involved in the case. In the circuit court it involves the whole controversy. In the supreme court only error. The original controversy is merged in the judgment as a finality. Surely a dismissal in this court has no reference to the controversy, but leaves the judgment standing. Only reversal can affect it. A dismissal agreed of a writ of error, therefore, would purge error, would be a release of error, and bar another writ of error, as that error was involved in the suit called a writ of error. Matters occurring after appeals, as payment, release of error and the like, going to bar the appeal may in proper mode be made in the appellate court, and issue made thereon: *Little v. Bower*, 134 U. S. 547, 10 Sup. Ct. Rep. 620; 2 ⁴²⁶ Cyc. 1007; *Hite v. Wilson*, 2 Hen. & M. 268. In this instance the court simply recites that it appeared from a paper that the matters in difference had been settled, and dismissed the writ of error on motion of Parker. There was no issue of payment. The other side did not appear to the motion. It cannot be said that this court really passed on the fact of payment, and adjudged and found such payment so as to make the dismissal *res judicata* on that fact. The paper referred to in the order recites the fact of payment, but shows no compromise on part payment. If there had been a controversy upon it, the court would have held it invalid as payment, as it was signed by the infant and next friend; but the dismissal was on motion of Parker, without appearance by the other side. There was no issue of payment. The court did no more than allow a dismissal. We do not think the order is a bar, but only a dismissal of the writ of error. Neither is it a ratification by this court of the compromise, because this was not the court to do this, the circuit court being the proper one before judgment, but not after. And the compromise was not before this court; only a receipt.

The court erroneously decided the case on the merits, as the bill stated a claim for relief on the merits. The decree is not based alone on defects of the bill; the bill is not dismissed for that cause, but on the merits. Though the plaintiff declined to amend, seeing that the bill may be amended, we will reverse the decree, at the costs of the appellant, and remand the cause with leave either to amend the bill in the respects pointed out, or to dismiss the suit without prejudice to the right of Louise Fletcher to bring another chancery suit to enforce the judgment or to collect it at law: *Van Winkle v. Blackford*, 33 W. Va. 588, 11 S. E. 26.

Reversed.

THE RIGHTS, DUTIES AND POWERS OF GUARDIANS AD LITEM AND NEXT FRIENDS OF INFANTS

- I. Power to Sue.**
- II. Can Act Only in the Matter for Which Appointed.**
- III. When Power Begins and Terminates.**
- IV. Acts of Guardian Binding on Infant.**
- V. Duty to Make Vigorous Defense.**
 - a. In General.
 - b. Can Make no Prejudicial Admissions.
 - c. Must Exclude Illegal Evidence.
 - d. May Assent to Acts not Prejudicial to the Infant.
 - e. Statutory Modification of the Rule.
- VI. Power of Compromise.**
- VII. Power to Arbitrate Claim.**
- VIII. Power to Receive Money Recovered and to Satisfy Judgment.**
- IX. Power to Contract for Legal Services.**
- X. Power to Purchase at Sale of Infant's Property.**
- XI. Power to Waive Service of Process.**
- XII. Right to Appeal.**
- XIII. Power to Make Oath for Infant.**
- XIV. Duty to Use Good Faith.**
- XV. Miscellaneous Rights and Duties.**

I. Power to Sue.

Infants, being persons under disability, cannot conduct their own legal proceedings, and the usual custom is for them to appear either by next friend or guardian ad litem. Under a Mississippi statute, a guardian ad litem is considered the full representative of the rights and interests of the minor for the particular case in which he was appointed, and has the same powers as a general guardian: *Burrus v. Burrus*, 56 Miss. 92; while in Pennsylvania a next friend of an infant, though recognized for certain purposes, is held not to have the power of a trustee or guarian: *Turner v. Patridge*, 3 Penr. & W. (Pa.) 172.

A suit may be brought by the next friend of an infant without first obtaining leave of the court or of the infant: *Bethea v. McCall*, 3 Ala. 449; *Barwick v. Rackley*, 45 Ala. 215; *O'Donnell v. Broad*, 11 Pa. Co. Ct. 622, 1 Pa. Dist. Rep. 650. But see *In re Whitlock*, 19 How. Pr. 380. He is, however, under the control of the court, and may be removed and another appointed if the interests of the infant require it: *Ex parte Kirkman*, 40 Tenn. (3 Head) 517. And in proceedings for the sale of real estate of a minor, the special guardian appointed was held to be an officer of the court; and that until he reached his majority, and the purchase money had in fact been paid over to him, and as long as it remained in the hands of the special guardian, the court had control over it and over all the proceedings in the application: *In re Price*, 67 N. Y. 231, affirming 6 Hun, 513.

Where a life insurance policy provided that in case of death the insurance should be paid to the children or their guardian, if under age, the guardian ad litem may sue therefor, and it need not be in the name of the general guardian: *Price v. Phoenix etc. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

II. Can Act Only in the Matter for Which Appointed.

Such representative of an infant can act only in the matter for which he was appointed: *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212. So a special guardian appointed to represent a minor in a private sale of land cannot bind him by a judgment in a suit brought by the guardian to compel a purchaser to take title: *Armstrong v. Weinstein*, 53 Hun, 635, 6 N. Y. Supp. 148. His authority does not extend to bringing or prosecuting more than the one particular action in which he was appointed: *Rosso v. Second Ave. R. Co.*, 13 App. Div. 375, 43 N. Y. Supp. 216. Therefore a guardian ad litem cannot agree that a decision in one case shall determine that in another, although the same facts are involved, the same parties, and substantially the same points of controversy: *McClure v. Farthing*, 16 Mo. 109. Where such a guardian is appointed in an action for the settlement of a trust, he cannot bind the infant by a stipulation in regard to the expenditure of money coming from a totally distinct source: *In re Kennedy's Estate*, 120 Cal. 458, 52 Pac. 820.

III. When Power Begins and Terminates.

The power of a next friend commences with the suit; and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived the necessity therefor: *Miles v. Boyden*, 20 Mass. (3 Pick.) 213. His authority terminates with the judgment in the case: *Davis v. Gist*, Dud. Eq. (S. C.) 1; or with the minority of the infant: *Lang v. Belloff*, 53 N. J. Eq. 298, 31 Atl. 604.

IV. Acts of Guardian Binding on Infant.

The acts of a guardian ad litem are binding on infant parties for whom they are performed, when not impeached for fraud, collusion, or gross misconduct: *Smith v. Taylor*, 34 Tex. 589. So if a party is served with process and a guardian ad litem is appointed to represent him, who appears and files an answer, the ward is brought into court for all purposes of the suit and is charged with notice of all new pleadings that may be filed either by the original parties or any others who may come into the case; and he is bound by whatever judgment may be recovered by or against any person who was a party to the suit at the time of its rendition: *Deering v. Hurt* (Tex.), 2 S. W. 42.

V. Duty to Make Vigorous Defense.

a. In General.—The law is exceedingly jealous in guarding the interests of infant suitors, and exacts of their next friends or guard-

guardian ad litem as vigorous a defense to the action as its nature will admit: *Sconce v. Whitney*, 12 Ill. 150; *Rhoads v. Rhoads*, 43 Ill. 239; *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015. In *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407, it is said: "It is the duty of the guardian ad litem, when appointed, to examine into the case and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He is not required to make a defense not warranted by law, but should exercise that care and judgment that reasonable and prudent men exercise, and submit to the court for its determination, all questions that may arise, and take its advice, and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants. The guardian ad litem who perfunctorily files an answer for his ward, and then abandons the case, fails to comprehend his duties as an officer of the court." See, also, *Stammers v. McNaughten*, 57 Ala. 277; *Stark v. Brown*, 101 Ill. 395. He cannot fail to plead just because the infants are unnecessary or improper parties: *Farmers' etc. Trust Co. v. Reid*, 3 Edw. Ch. 414. And if the interests of the minors are prejudiced through the failure of the guardian ad litem to raise a proper objection to an action he is liable to them therefor: *Reed v. Reed*, 46 Hun, 212, 13 Civ. Proc. Rep. 109. See, also, *Banta v. Calhoun*, 9 Ky. (2 A. K. Marsh.) 166.

b. **Can Make no Prejudicial Admissions.**—So far as concerns the substantial rights of his ward, a guardian ad litem can make no admissions to bind him, but everything must be proved against an infant: *Hooper v. Hardie*, 80 Ala. 114; *Pillow v. Sentelle*, 39 Ark. 61; *Evans v. Davies*, 39 Ark. 235; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212; *Cochran v. McDowell*, 15 Ill. 10; *Taylor v. Parker*, 1 Smith (Ind.), 225; *Melton v. Brown*, 20 Ky. Law Rep. 882, 47 S. W. 764; *Benson v. Wright*, 4 Md. Ch. 278; *Burt v. McBain*, 29 Mich. 260; *Cooper v. Mayhew*, 40 Mich. 528; and this holds good both at law and in equity: *Atchison etc. R. Co. v. Elder*, 50 Ill. App. 276; *Collins v. Trotter*, 81 Mo. 275.

In *Atchison etc. R. Co. v. Elder*, 50 Ill. App. 276, an infant was injured in a railroad accident. His father, as next friend, entered into a compromise with the railroad company, whereby a suit was instituted, attorneys employed by the company preparing the papers. The matter was submitted to the court, without a jury and without evidence, and a judgment for plaintiff entered for two hundred and fifty dollars, pursuant to the compromise. An amended declaration was filed, whereon a hearing was had and the recovery increased to two thousand five hundred dollars. The appellate court affirmed this judgment, holding that no estoppel applicable to the father could affect the infant. That a plaintiff in ejectment may be estopped from claiming land by recitals of ownership in a deed of his special guardian, see *Esterbrook v. Savage*, 21 Hun, 145.

c. Must Exclude Illegal Evidence.—If incompetent and illegal evidence is introduced, without any objection on the part of the guardian, the court is bound to notice and exclude it: *Cartwright v. Wise*, 14 Ill. 417; *Turner v. Jenkins*, 79 Ill. 228. And such guardian cannot consent to the taking of testimony before a person not properly authorized to take it: *Fischer v. Fischer*, 54 Ill. 231.

A guardian ad litem should not consent to a general reference to a master to take an account against an infant, until he has ascertained that his rights can be protected on such reference: *Jenkins v. Freyer*, 4 Paige, 47. Where infants sue by their next friend to obtain a settlement of an administrator's account, an attorney employed by such next friend cannot bind the infants by an agreement to waive proof of the vouchers and accounts presented by the administrator, or to allow commissions other than allowed by law: *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

d. May Assent to Acts not Prejudicial to the Infant.—While a next friend cannot admit or stipulate away any substantial rights of the minors whom he represents, he may assent to arrangements which will facilitate the trial, and the infant is bound thereby. So he may consent to a trial of the case at the first term of court: *McMillan v. Hunnicutt*, 109 Ga. 699, 35 S. E. 102. A similar question arose in *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, where Justice Harlan, speaking for the court, said: "It is undoubtedly the law in Illinois, as elsewhere, that a next friend or guardian ad litem, cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian ad litem or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. There is but one supreme court of Illinois, although for the convenience of litigants it sits in different places in that state, and, unless the consent of parties is given, can take cognizance, when holding its session in a particular grand division only of cases arising in such division. But it is the same court that sits in the respective divisions, and a consent by the next friend or guardian ad litem that a case be heard in a particular division, could not possibly prejudice the substantial rights of the infant. It is true that the consent of the plaintiff's next friend and guardian ad litem, that the case should go to the central grand division, brought it to a more speedy hearing than it would otherwise have had, if such consent had not been given. But, certainly, it was not to the interest of the plaintiff that the final determination of his case should be delayed." So he may consent to the removal of a cause from one court having jurisdiction thereof to another court of like jurisdiction: *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 245, citing *Morriss v. Virginia Ins. Co.*, 85 Va. 588, &

S. E. 383. And he may, in his answer, admit such facts as do not tend to prejudice his ward: *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291. He may also stipulate as to the condition of a bank account and so obviate the necessity of introducing the bank books in evidence, such not prejudicing the infant: *Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743. In *Biddinger v. Wiland*, 67 Md. 359, 10 Atl. 202, an infant defendant was regularly summoned, and, under the law then in existence, a commission to assign a guardian and take her answer was issued, and returned unexecuted. A second commission was issued, and also returned unexecuted. Meanwhile, and before the court, under the new rules, appointed a guardian to defend, the case being at issue as to other parties, adults, testimony was taken which fully established plaintiff's case. After that testimony was taken and returned, the court appointed a solicitor of the court to answer and defend for the infant, who did so, submitting the infant's rights to the protection of the court. It was then agreed in writing between the plaintiff's solicitor and the guardian, that the case should be submitted without argument to the court, the testimony already taken to have the same effect as if taken by the examiner after the infant's answer had been filed. This agreement was objected to as unauthorized, but the court held it proper; that the guardian must be presumed to have done his duty, and knew of no other testimony which could be procured in the infant's behalf; and the judgment was affirmed.

A guardian may adopt a report of the division of land in a partition suit, after the infants have been served, and so avoid the necessity for another division, where they were not made parties to the suit, and it was therefore reversed: *Kentucky etc. Land Co. v. Elliott*, 12 Ky. Law Rep. 812, 15 S. W. 518.

e. **Statutory Modification of the Rule.**—Where by statute a different rule is prescribed as to the power of a guardian ad litem to admit material facts in the conduct of a trial, or to control the case with as full authority as the minor could if he were of full age, such guardian may bind his ward by stipulation in the nature of a waiver of proof: *Le Bourgeoise v. McNamara*, 82 Mo. 189, affirming 10 Mo. App. 116.

VI. Power of Compromise.

The general rule undoubtedly is, that the next friend or guardian ad litem of an infant has no power to compromise or settle the claim of his ward, and no agreement to that end can bind his ward, unless sanctioned by the court: *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Johnson v. McCann*, 61 Ill. App. 110; *Edsall v. Vandemark*, 39 Barb. 589; and especially is this so after it has been prosecuted to a judgment: *O'Donnell v. Broad*, 2 Pa. Dist. Rep. 84; *Fletcher v. Parker* (principal case), 53 W. Va. 422, 44 S. E. 422. So if a next friend commutes a debt or judgment due his infant ward, he is responsible for the

amount thereof and interest: *Forbes v. Mitchell*, 24 Ky. (1 J. J. Marsh.) 440; or the court may set aside such wrongful compromise: *In re Etna*, 1 Ware (462), 474, Fed. Cas. No. 4542. Where a next friend of minors died, and they inherited from him a greater amount of property than the judgment which he compounded, chancery will not prevent their looking to the judgment debtor, especially where the composition is of a doubtful nature, and make the debtor resort to the estate of the next friend: *Miles v. Kaigler*, 18 Tenn. (10 Yerg.) 10, 30 Am. Dec. 425.

In *George v. Knox*, 23 La. Ann. 354, an agreement was made by the attorney of the vendor of real estate with the curator ad hoc, who represented the vendee in a suit to rescind the sale, by which the vendee was to take the rents of the property during the time that he had it in possession as an equivalent for a part of the price that he had already paid. This agreement was held not binding on the vendee, the curator ad hoc not being authorized to make it.

While holding that a next friend cannot enter into a compromise made out of court and not approved by the court, or where judgment is not entered in pursuance thereof, the case of *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208, is to the effect that a fair adjustment in court is allowable. It is there said: "We see no reason why the next friend should not have authority to institute or to entertain negotiations for a settlement of the controversy. His position with reference to it is like that of a general guardian, or the guardian ad litem of an infant defendant. It is to be expected that he will act fairly and intelligently for the real interest of the plaintiff; but it cannot be said that every suit brought in the name of the infant is upon a good cause of action, or that, if well brought, the just amount of the recovery cannot be arrived at without a trial, or that when the next friend and the defendant, and their respective counsel, who are sworn officers of the court, act in good faith, it is necessary that an investigation of the fairness of a proposed adjustment should be made or ordered by the court before disposing of the cause. The next friend is intrusted with the rights of the infant so far as they are involved in the cause, and acts under responsibility both to the court and the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial."

VII. Power to Arbitrate Claim.

A guardian ad litem or next friend cannot bind his wards by submitting the suit in their name to arbitration; but it is his duty alone to conduct the suit in court: *Fort v. Battle*, 21 Miss. (13 Smedes & M.) 133; *Hannum v. Wallace*, 28 Tenn. (9 Humph.) 129; *Tucker v. Dabbs*, 59 Tenn. (12 Heisk.) 18.

VIII. Power to Receive Money Recovered and to Satisfy Judgment.

The weight of authority is to the effect that a next friend has no authority to receive the money recovered in the action prosecuted by him, his power of representation ending with the suit; and for the same reason he cannot enter satisfaction on the record: *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Glass v. Glass*, 76 Ala. 368; *Westbrook v. Comstock*, Walk. Ch. (Mich.) 314; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Miles v. Kaigler*, 18 Tenn. (10 Yerg.) 10, 30 Am. Dec. 425; *American Lead Pencil Co. v. Davis* (Tenn.), 67 S. W. 864. Therefore a judgment for the plaintiff, a minor, for personal injuries, should not direct payment of the money to his next friend, but should require it to be deposited with the clerk of the court, and by him paid to the minor's guardian: *City of Austin v. Colgate* (Tex. Civ. App.), 27 S. W. 896. Where by statute it is provided that any judgment recovered by a minor not exceeding five hundred dollars, may, if he have no guardian, be taken charge of by his next friend, such next friend has no authority to receive a recovery of a sum exceeding that amount: *Gulf etc. Ry. Co. v. Younger*, 19 Tex. Civ. App. 242, 45 S. W. 1030.

If a next friend admits satisfaction of judgment on the record, it will be set aside in equity at the suit of the plaintiff therein after he has attained his majority: *Cody v. Roane Iron Co.*, 105 Tenn. 515, 58 S. W. 850. There the court, after stating the general rule that a payment made to the next friend will not operate as a satisfaction, continued: "Hence the payment made to the next friend of this complainant was and is, in legal contemplation, the same as no payment at all.

"Such being true, the case now before the court is one in which there is a recited satisfaction in the face of a judgment where, in fact and in law, no satisfaction has been had, and that recitation, if allowed to stand, must inevitably preclude the complainant from the collection of his recovery, and thereby work a great wrong and fraud upon his confessed and adjudged rights.

"It is the peculiar province and pride of a court of equity to vouchsafe all needed and appropriate relief in such a case.

"It cannot be said against the complainant that he has been guilty of any wrong or fault at any point. The loss, if any, to be sustained through the payment already made, is due alone to the joint and illegal act of this defendant and the next friend, each of whom was charged with knowledge that such payment was wholly unauthorized in law; and it is better, if such be the ultimate result, that a participant in that act pay twice, than that the only person entitled to the money, and who is entirely innocent, should not be paid at all."

Payment to a *prochein ami* may, however, be legal satisfaction of recovery if ratified by the minor after attaining his majority or his

legal representative after his death: *Allen v. Roundtree*, 1 Spear (S. C.), 80.

The minority view holds that the next friend may receive the recovery, give a sufficient acquittance and satisfy the judgment: *Baltimore etc. R. Co. v. Fitzpatrick*, 36 Md. 619; *O'Donnell v. Broad*, 2 Pa. Dist. Rep. 84; and it may be paid to his regularly appointed attorney, but the right of the next friend or his attorney to receive the money is subordinate to that of the regular guardian: *Baltimore etc. R. Co. v. Fitzpatrick*, 36 Md. 619. See, also, *Stroyd v. Traction Co.*, 15 Pa. Super. Co. 245.

In *Cody v. Roane Iron Co.* (Tenn.), 53 S. W. 1002, affirmed, 105 Tenn. 515, 58 S. W. 850, it is held that though a next friend has no right to take the money paid him out of court, he may acknowledge satisfaction on the record; that the proper course is for the court to direct the money to be paid into court, for the purpose of being subsequently paid out to the regular guardian, or of being lent out under order of court for the benefit of the infant.

IX. Power to Contract for Legal Services.

Where it is for the infant's benefit that counsel be employed, the guardian ad litem or next friend may do so: *Glass v. Glass*, 76 Ala. 368; *Baltimore etc. R. Co. v. Fitzpatrick*, 36 Md. 619; *Colgate v. Colgate*, 23 N. J. Eq. 372. But see *In re Johnston*, 6 Dem. Sur. (N. J.) 355, holding that a guardian ad litem in the surrogate's court will employ counsel at his own expense.

There is a conflict as to whether such guardian may enter into a contract for the services of an attorney. In *Yourie v. Nelson*, 1 Tenn. Ch. 614, it is held to be his duty to make a contract with counsel for professional services, or agree with him as to his compensation, and such expenses fall under the head of just allowances to which fiduciaries are entitled. Other cases take an opposite view, under which he cannot bind his ward by a contract for attorney's fees: *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78; *Houck v. Birdwell*, 28 Mo. App. 644. In the former of those cases it is said: "The guardian ad litem is an officer of the court appointing him; his duties 'are to represent the infant, insane or incompetent person in the action or proceeding': Code Civ. Proc., sec. 372. He may, doubtless, employ an attorney to assist him in the prosecution or defense of the action, but he may not make a contract for the payment of compensation which shall absolutely bind the ward or his estate. . . . His powers are certainly no greater than those of a general guardian. Like the latter he may be allowed a credit for moneys advanced or paid out of the fund collected, as reasonable compensation for the expenses, and for the services of an attorney. But he has no power by specific agreement with the attorney to fix

such compensation absolutely. An attorney accepting employment, and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjusting proper compensation. He cannot determine the amount, nor can he retain what he or the guardian ad litem may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon a quantum meruit. The presumption of a promise is rebutted by the fact that the guardian had no power to contract in such manner as to bind the assets of the ward except conditionally."

X. Power to Purchase at Sale of Infant's Property.

The question has arisen as to how far a next friend or guardian ad litem is a trustee in such a sense as to be prohibited from purchasing the infant's property at a sale. The Kentucky courts hold that he is not such a trustee, and the rule does not apply: *Mitchell v. Berry*, 58 Ky. (1 Met.) 602. In *Spencer v. Milliken*, 4 Ky. Law Rep. 856, it was held that a sale was not void because a guardian ad litem was the purchaser, the infant having been represented by a trustee who defended for him.

The decision of the other courts, however, consider a guardian ad litem as a trustee within the meaning of the rule, and will not uphold a purchase by him at a sale of the infant's property: *Collins v. Smith*, 38 Tenn. (1 Head) 251; *Starkey v. Hammer*, 60 Tenn. (1 Baxt.) 438; *Gallatian v. Cunningham*, 8 Cow. 361; nor can he acquire the property of infant heirs pending a litigation in respect to it: *Massie v. Matthews*, 12 Ohio, 351.

The rule prohibiting a purchase by a guardian ad litem, not made for the benefit nor in behalf of his infant wards, is absolute, and it makes no difference that the purchase was made, not for the guardian's own benefit, but for that of some other person: *Le Fevre v. Laraway*, 22 Barb. 167. The presumption in the case of a purchase by the guardian ad litem is that it is for his benefit, and the burden is on him to show that it was made for the infant's good: *O'Donoghue v. Boise*, 92 Hun, 3, 37 N. Y. Supp. 961. That the remedy of infants against persons purchasing from their guardian ad litem, who bought the property at a sale, is, in the absence of any statutory provision, in equity, and hence voidable and not void, see *Dugan v. Denyse*, 13 App. Div. 214, 43 N. Y. Supp. 308.

XI. Power to Waive Service of Process.

As a general rule, a guardian ad litem cannot waive service of process: *Robbins v. Robbins*, 2 Ind. 74; *Pugh v. Pugh*, 9 Ind. 132; *Cormier v. De Valcourt*, 33 La. Ann. 1168. So the answer of guardian ad litem does not make his wards parties and dispense with the necessity of services of process: *Frazier v. Pankey*, 31 Tenn. (1 Swan.) 75. In *Hannum v. Wallace*, 28 Tenn. (9 Humph.) 129, however, it

was held that, if not prejudicial to their interests, the guardian might waive service of a copy of the declaration and notice, thus saving delay and a useless accumulation of costs.

In *Banta v. Calhoun*, 9 Ky. (2 A. K. Marsh.), 166, it was held that if the guardian appeared, it was not necessary for process to be served on the infant. And where a minor has been served with citation, and a guardian ad litem appointed for him, such guardian may waive notice of citation, and consent to a hearing: *Pollock v. Buie*, 43 Miss. 140. Where a warning order published against a minor defendant was not entirely definite as to the place at which he was warned to appear, and a guardian ad litem was appointed by the court, who filed an answer for his ward, it was held that the notice and appearance were sufficient to bind the latter: *Williams v. Ewing*, 31 Ark. 229.

XII. Right to Appeal.

A guardian ad litem may and should appeal whenever, in his opinion, it is necessary to protect his ward's interest: *Sprague v. Beamer*, 45 Ill. App. 17; *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015, and leave of the court is not necessary: *Jones v. Roberts*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

Under a statute restricting the right of appeal to parties to a suit, a guardian ad litem may be a party thereto, and as such has the right of appeal on behalf of the infants, to protect or advance their interests: *Thomas v. Safe Deposit etc. Co.*, 73 Md. 451, 21 Atl. 367, 23 Atl. 3. In *Harlan v. Watson*, 39 Ind. 393, it is held that such a guardian cannot appeal in his own name.

XIII. Power to Make Oath for Infant.

The next friend of an infant may verify a pleading in the action in which he is acting: *Turner v. Cook*, 36 Ind. 129; and he may make an affidavit in replevin: *Wilson v. Me-ne-chas*, 40 Kan. 648, 20 Pac. 468; and also for an attachment, and stating therein that he has commenced the action as next friend sufficiently avers the agency: *McDowell v. Nims*, 15 Week. Law Bull. (Ohio) 359.

XIV. Duty to Use Good Faith.

A guardian ad litem must act toward the infant whom he represents in good faith: *Spelman v. Terry*, 74 N. Y. 448. In that case a special guardian attempted to make use of an invalid claim and to put a purchaser of such claim from him in possession of land of an infant. The court condemned any such action in the following words: "We do not hold that one appointed special guardian to sell infants' real estate, who then holds a valid encumbrance upon or a claim against the same, thereby loses his rights in his encumbrance or claim, or is to forego the sale of it to his own advantage. What we do hold is, that he may not after he is appointed, so use an invalid claim held by him, as to put a purchaser of it from him into

possession of the lands; whereby an action of ejectment is made necessary to regain possession by the one lawfully entitled. It is an act in hostility to the interests of his ward, and inconsistent with the duty he owes. For the damage from such act he should make just compensation. Such rule is a branch of the principle that one holding a relation of trust to another cannot deal with the trust estate or fund to his own profit and the harm of the cestui que trust." If the next friend plays his infant ward false, the judgment is not thereby rendered void, but the defrauded plaintiff may resort to a court of equity to set aside and undo the fraudulent work and to wipe out the record, falsely obtained, by which he is confronted: *Cudleigh v. Chicago etc. Ry. Co.*, 51 Ill. App. 491.

In *Ivey v. McKinnon*, 84 N. C. 651, it is held that if in partition proceedings the interest of a *prochein ami* is adverse to that of the infant, a decree therein will not on that account be disturbed unless fraud or collusion is established. Where an infant sues a guardian personally for positive and specific fraud, no prior accounting from the guardian is necessary, as it is where an action upon a guardian's bond against his sureties is sought to be brought: *Koch v. Le Frois*, 61 Hun, 205, 15 N. Y. Supp. 928. It is not a badge of fraud that a decree, rendered on a certain day, was entered as of a week previous, without objection from the guardian *ad litem*; nor that he failed to apply for a rehearing: *Kingsbury v. Buchner*, 134 U. S. 650, 10 Sup. Ct. Rep. 638. And taking a second mortgage by a special guardian is not wrongful, nor necessarily a breach of trust, where appointed for the sale of infants' lands: *Monroe v. Osborne*, 43 N. J. Eq. 248, 10 Atl. 267.

XV. Miscellaneous Rights and Duties.

The powers of a guardian *ad litem* are strictly limited to the matter before the court. Hence he cannot bind his ward by a release, to qualify a witness to testify: *Walker v. Ferrin*, 4 Vt. 523; nor can he make a demise in ejectment: *Massies v. Long*, 2 Ohio, 287, 15 Am. Dec. 547. He cannot consent to a sale of his ward's real estate to satisfy notes for purchase money, before their maturity: *Mekton v. Brown*, 20 Ky. Law Rep. 882, 47 S. W. 764. If, however, a sale of the minor's property is for his benefit, it will not, without complaint on his part, be set aside on the application of the purchaser: *Curd v. Bonner*, 44 Tenn. (4 Cold.) 632. Where a special guardian of infants entered into a contract of sale conjointly with the adult owners, and the deed tendered the purchaser was executed by the guardian jointly with the other owners, it was held no objection, the fact that other parties owning other interests joined in the same contract and deed not depriving either instrument of its binding effect upon all concerned: *O'Reilly v. King*, 28 How. Pr. 408.

Where an order is made by a court of chancery appointing a guardian for certain infants, and authorizing him to cancel a bond and

mortgage belonging to them, upon receiving another one on unencumbered real estate, this latter provision is a condition precedent to his discharging the bond and mortgage, and he has no right to do so unless he receives the security mentioned in the order: *Swarthout v. Swarthout*, 7 Barb. 354.

A replevin bond in a suit by an infant is valid, though executed by his next friend as one of the two sureties required by statute, he not being a party, but in the nature of an attorney: *Anonymous*, 2 Hill, 417. He may elect to bring the infant's estate into hotchpot: *Andrews v. Hall*, 15 Ala. 85.

Where a mortgage is given to the special guardian of an infant for the latter's benefit, such special guardian is the proper person to file a bill for the redemption and assignment of a senior mortgage upon the same premises: *Pardee v. Van Anken*, 3 Barb. 534. The investment of infant's money by a guardian ad litem in the capital stock of a bank is legal, though it afterward fail: *Haddock v. Planters' Bank*, 66 Ga. 496.

A next friend falls within the principle that statements made in the course of judicial proceedings with regard to third persons are conditionally privileged and not actionable if made without malice, with probable cause, and under such circumstances as to reasonably create the belief that they were true: *Ruohs v. Backer*, 53 Tenn. (6 Heisk.) 395, 19 Am. Rep. 598.

TOMPKINS v. PACIFIC MUTUAL LIFE INS. CO.

[53 W. Va. 479, 44 S. E. 439.]

LIMITATIONS, Statute of—Bar of, When Prevented by Suit to Dismiss for Want of Prosecution.—Under a statute providing that if any action commenced within due time should be arrested or reversed on a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the cause having been dismissed for want of security for costs, or by reason of any cause which could not be applied in bar of the action, then, notwithstanding the expiration of the time within which a new suit or action may otherwise be brought, the same may be brought within one year after the dismissal of the other cause, or after the arrest or reversal of the judgment, the fact that the first cause was commenced in a court of the United States, where it was dismissed for want of jurisdiction, does not deprive the plaintiff of the benefit of the statute or of the right to bring a new action within a year after such dismissal. (p. 1011.)

INSURANCE Against Accident—Right of Examination.—Under a policy providing that any medical adviser of the company shall be allowed to examine the person or body of the injured in respect to an injury or cause of death, in such manner and at such

times as he may require, the insurer has the right of examination and nothing more, and the authority of its agent is confined within the same limits. It confers no right to treat the injury, and the injured is not bound to submit to any course of treatment at the hands of any physician that the company may indicate. (pp. 1017, 1018.)

INSURANCE Against Accident—Relation Between the Insurer and the Medical Examiner.—If a policy of insurance stipulates that a medical adviser shall be allowed to examine the person or body of the injured in respect to the injury, the relation between the insurer and its medical adviser in making such examination is that of master and servant, and the principle of respondeat superior applies between them. (p. 1018.)

INSURANCE Against Accident—Care to be Exercised in the Examination of an Assured.—Where a policy of insurance reserves to an insurer the right to the examination of the insured in respect to an injury, he is entitled to insist upon the use of care and skill in the exercise of the right of examination. (p. 1019.)

INSURANCE Against Accident—Liability of Insurer for Negligence of Medical Examiner.—If the injury to the insured requires a plaster cast or similar appliance to hold injured ligaments in place until they are wholly well or regain strength, and the medical adviser of the insurer, in making an examination, removes and fails to replace such appliance, and injury results therefrom, he is guilty of negligence, for which his principal must answer in damages. (p. 1025.)

JURY TRIAL—Instruction Relating to the Interest of a Witness, When May be Refused.—The court may refuse an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and his interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, if testimony against him has been given by a witness who is also deeply interested in a moral sense, and no such direction as to his testimony is included in the proposed instruction. (p. 1025.)

Simms & Enslow, for the plaintiff in error.

Harvey, Wiatt & Switzer, for the defendant in error.

480 **POFFENBARGER, J.** On the thirtieth day of September, 1898, George H. Tompkins, a resident of Clifton Forge, Virginia, instituted an action in the circuit court of the United States in the district of West Virginia, against the Pacific Mutual Life Insurance Company, a California corporation, doing business in West Virginia, for the recovery of damages for an alleged wrong, on an alleged cause of action accruing to him in October, 1897, in which action he recovered a judgment, which was afterward reversed by the United States circuit court of appeals, and the action directed by said court to be dismissed for want of jurisdiction, which was accordingly done by the said circuit court. Within one year after the dismissal aforesaid, to wit, on the third day of November, 1900,

said Tompkins instituted this suit in the circuit court of Cabell county for the same cause of action, alleging in his declaration the prosecution and dismissal of said former action, and that this action was brought within one year after said dismissal. To the declaration and each count thereof, the defendant demurred, after having had oyer of the writ and return, which demurrer was overruled, and thereupon a plea of not guilty was entered. The defendant pleaded also the statute of limitations, and the plaintiff was permitted to file his replication in writing to said plea, setting up the pendency of said former suit for the same cause of action, its dismissal for want of jurisdiction and the commencement of this suit within one year ⁴⁸¹ thereafter. Trial was had and a verdict rendered for the plaintiff, assessing his damages at two thousand dollars, and, after overruling a motion to set aside the verdict, judgment was rendered accordingly.

Said replication was filed under section 19 of chapter 104 of the Code, which reads as follows: "If any action, commenced within due time, in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her death or marriage, or if, in an action commenced within due time, judgment (or other and further proceedings) for the plaintiffs should be arrested or reversed, on a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action, of the loss or destruction of any of the papers or records in a former suit which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal or other cause, or after such arrest or reversal of judgment, or such loss or destruction but not after."

In support of its contention that the court erred in permitting said replication to be filed, the plaintiff in error relies upon two Virginia decisions and one Tennessee decision, and the defendant in error relies upon a decision of the supreme court of the United States, construing the Tennessee statute and an Ohio decision construing a similar section of the Ohio code. The first Virginia case is *Gray v. Berryman*, 4 Munf. 181. The Virginia statute construed in that case provided that, if judgment for the plaintiff be reversed by error, or judgment

be given against the plaintiff upon matter alleged in arrest of judgment, that he take nothing by his plaint, writ or bill, a new action might be commenced within one year after such reversal or judgment against the plaintiff. The other case is that of *Mannel v. Norfolk etc. R. R. Co.*, 99 Va. 188, 37 S. E. 957, construing the present Virginia statute, which provides that if an action commenced in due time abate by the return of no inhabitant or by the death or marriage of the defendant, or if, ⁴⁸² in such action, judgment for the plaintiff be arrested or reversed upon a ground which does not preclude a new action for the same cause, or the plaintiff shall proceed in the wrong form or bring the wrong form of action, and judgment be rendered against him solely upon that ground, a new action may be brought within one year after such reversal or judgment. In the first of said two Virginia cases a suit in equity had been brought and dismissed for want of jurisdiction, and it was held that an action at law for the same cause of action thereafter commenced was not within the exception. In the second, the plaintiff had taken a nonsuit, and thereafter instituted another action for the same injury, and it was held that that case was not within the exception to the statute of limitations.

The Tennessee statute reads as follows: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff and upon any ground not concluding his right of action, or where the judgment or decree is rendered against the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest." The supreme court of Tennessee, in *Sweet v. Electric Light Co.*, 97 Tenn. 252, 36 S. W. 1090, held that a suit commenced in a court having no jurisdiction and dismissed for want thereof, was a nullity, and that as, in such case, no action had been commenced within the meaning of the statute, such proceeding did not prevent the running of the statute, nor bring the case within the exception. That is the contention of the plaintiff in error, this cause of action having been first set up in a court having no jurisdiction and there dismissed on that ground, and then sued on in the state court more than one year after the accrual of the right of action, but within one year after the dismissal of the proceedings in the federal court.

In *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319, the supreme court of the United States construed the same Tennessee statute and arrived at the conclusion seemingly in conflict

with that announced by the Tennessee court. Said case was decided in 1887, and the Tennessee case of Sweet v. Electric Light Co. in 1898, and, strange to say, the Tennessee court did not even notice the ⁴⁸³ former decision of a similar question upon the same statute by the supreme court of the United States. There is a distinction between the two cases, however. In Smith v. McNeal, the dismissal was for want of the allegation of a jurisdictional fact which actually existed and which, if alleged, would have given jurisdiction. In the Tennessee case, the former action had been brought in a court in which jurisdiction could not have been shown in the declaration. The construction given the statute in Sweet v. Electric Light Co. may be said to find some countenance in the opinion delivered by Mr. Justice Woods in Smith v. McNeal, where it is said: "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

The latest case bearing upon the question is Pittsburgh etc. R. R. Co. v. Bemis, 64 Ohio St. 26, 59 N. E. 745, decided in January, 1901, construing the Ohio statute which reads as follows: "If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or if he die and the claim of action survive, his representatives may commence a new action within one year after such date—and this provision shall apply to any claim asserted in any pleading by a defendant." There, the status of the case was very much like that of this one. The action had first been brought in the federal court and dismissed for want of jurisdiction, and then brought in the state court, and it was held that the right of action was within the saving clause of the statute of limitations. The opinion delivered is very exhaustive and shows that the matter has been thoroughly considered. It analyzes fully the opinions in Smith v. McNeal and Sweet v. Electric Light Co., construing the similar Tennessee statute. Among other things that opinion says: "In no text-book, and in no reported case cited to us save Sweet v. Electric Light Co., 97 Tenn. 252, 36 S. W. 1090, is there any statement or intimation that the question of the jurisdiction of the court has any potency whatever

⁴⁸⁴ in determining what is, and what is not, an action, and we are convinced that in Ohio, whatever may be the rule elsewhere, there is no authority for the distinction which counsel seek to draw, and we are equally clear that it rests upon no substantial ground."

Our statute seems to be somewhat broader, or, to say the least, more positive and affirmative in the expression of the width of its scope than any of the other statutes; for it says "if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action," a new action may be brought within one year after the dismissal. It is a highly remedial statute and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law, from loss of his right of action by reason of accident or inadvertence, and it would be a narrow construction of that statute to say that, because a plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it. In this connection, *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925, is relied upon by plaintiff in error. That was a case in which the plaintiff failed, after having brought his suit, to file his declaration within three months, by reason of which his action was dismissed at rules. He claimed the benefit of said section 19 of chapter 104 of the Code, and it was held that he was within the letter of it, but that he could not claim the benefit of it for the reason that the dismissal was wholly imputable to his voluntary abandonment of the suit. In the opinion of the court, delivered by Judge Brandon, it is said: "He either intentionally abandoned his first suit, or neglected it, which operated in law to discontinue it. It is a voluntary dismissal, or call it a discontinuance, by reason of the plaintiff's nonaction." Here it cannot be said that the plaintiff below had voluntarily dismissed his former action in the federal court, for he prosecuted it to final judgment and defended the writ of error in the appellate court, and went out of the court, not by reason of his failure to prosecute, but by force of the strong hand of the court, pronouncing the law against him on the question of jurisdiction. The two cases are not analogous, unless we adopt the ⁴⁸⁵ reasoning of the Tennessee court whereby a distinction is made upon very narrow and technical grounds which have been declared by another reputable court, upon an apparently more mature and thorough consideration, to be unsound.

In support of the demand set up in this action, the principles of law, imposing upon a master liability for the acts of his agent, are relied upon; it being insisted that the injury for which damages are claimed from the defendant is the result of a negligent act of the defendant by its agent. Defendant below, plaintiff in error, insists that the injurious act, if done by its agent, was outside of the scope of his agency or authority. These contentions, upon the peculiar facts involved, present a novel case and a question rather difficult of solution.

Tompkins, a brakeman on the C. & O. Ry., holding an insurance policy issued by the defendant company, providing, among other things, for the payment of a weekly indemnity of ten dollars, in case of such injury, by external, violent and accidental means, as should, independently of all other causes, immediately, continuously and wholly disable and prevent him from engaging in any work or occupation for wages, stepped on a peach seed at Huntington, West Virginia, on the second day of July, 1897, whereby his right foot and ankle were so wrenched and sprained that, after having subsequently made three trips as brakeman, the injury required attention and his physician placed his foot in a plaster of paris cast to keep it and the muscles and ligaments rigidly in a certain position, upon the theory that the ligaments, supporting the lower part of the foot, had been badly strained, lacerated or broken loose, and must be in some way held in place long enough to permit them to heal and regain sufficient strength to support the lower part of the foot. This was done by Dr. George S. Bonner of Clifton Forge, on or about the fifth day of September, 1897, who says his conclusion, upon his diagnosis, was that the injury was "nothing more than the weakness which usually follows a sprain and the susceptibility to rheumatism or something of that sort." On or about the eighth day of October, 1897, said cast was taken off by Dr. James F. Hughes, who was the examining surgeon, or medical adviser, of the insurance company, and had come to Tompkins' house for the purpose of making an examination of Tompkins in respect to the injury, under a clause in the ⁴⁸⁶ policy, requiring the insured to allow such examination in such manner and at such times as the medical adviser might require. After making the examination, Dr. Hughes left without replacing the cast or putting on another, and the plaintiff's foot soon became worse and he has partially lost the use of it, although, after the lapse of considerable time, an effort was made to restore it to health and strength by again encasing it

as before and other treatment. There is a sharp conflict as to what occurred between the plaintiff and Dr. Hughes at the time the examination was made, the claim on the part of Tompkins being that the casing was taken off against his protest and by his unwilling submission to the exercise of the company's right of examination as proposed and executed; and, on the part of the company that Tompkins consented to the removal of the support and the discontinuance of its use.

This explanation suffices to fairly indicate the nature of the objection made to the declaration, which sets out, in varying language, in its four counts, matter which is substantially covered by the foregoing statement, and alleges the duty of the defendant to use care, skill and a due regard for the interests and welfare of the plaintiff in the exercise of its right of examination, and its failure so to do, as well as its wrongful and negligent conduct in removing the plaster cast and failing to restore it, and in requiring and causing the plaintiff to let it remain off.

The objection, on demurrer as indicated in the brief filed for plaintiff in error is that "in various counts in the declaration alleging negligent and unskillful manner of making the examination, there is interwoven alleged malpractice, bad medical advice and treatment subsequent to the removal of the cast and examination." The charge is, to some extent, borne out by the language of the declaration, but that does not make it faulty on demurrer. No recovery would be permitted on that part of the declaration. It must be treated as a surplusage, irrelevant matter, not vitiating the declaration, but objectionable on the ground that it encumbers the record. *Utile per inutile non vitiatur*: 4 Minor's Institutes, 1264; St. Pl. 424.

Further assignments of error are predicated upon the rulings of the court in giving and refusing instructions and in refusing ⁴⁸⁷ a new trial. A résumé of the evidence is necessary to an intelligent disposition of them.

The testimony of the plaintiff, aside from the particulars of his original injury and treatment of it prior to the removal of the plaster cast is, in substance, as follows: At first he refused to allow Dr. Hughes to remove the cast until he should consult his physician; Dr. Hughes insisted that it be taken off, and he finally consented; Dr. Hughes represented that the insurance company had sent him there to examine the injury, and if he was not permitted to do so, the company would not allow him anything; he yielded to this, thinking it best to allow

the examination to be made; after the cast was taken off, Dr. Hughes told him he did not see anything the matter with the foot and to get up and walk across the floor; he attempted to do so, but could not; before its removal, he could get around with the aid of a cane; Dr. Hughes told him to go to the window, and that there was nothing the matter with his foot and in a few days he could throw his cane away; he told him he could not walk to the window and back; Dr. Hughes insisted next morning that he get up and throw away the cane and go down town; he made the examination on the 3d or 4th of October, and on or about the 8th the foot had become so much worse that plaintiff went to see Dr. Hughes about it and told him he could not walk on it, and was directed to paint it with a solution of iodine, which was done; as the foot continued to grow worse, he told him to use crutches, and, finally, that he did not know what to do as he had never seen a sprain turn out to be so serious; he kept going to Dr. Hughes until about the 25th of the month, when he told Hughes he saw no use in depending upon him further, to which Hughes assented, and then went back to the physician who had first treated him, and who declined to have anything further to do with the case, as the injury had become so serious; Dr. Hughes then advised him to go either to Baltimore to a hospital or to Dr. McGuire at Richmond; he went to Richmond and was directed by Dr. McGuire to put a plaster cast back on the foot; on his return, Dr. Hughes was requested to put it on which he did in an imperfect manner; then Dr. Bonner was sent for, who procured a suitable bandage and put it on, and it remained on the foot until in February, 1898; as the foot was then found to be in⁴⁸⁸ bad condition, plaintiff went to McGuire's hospital where he was treated specially and by various methods, which resulted in some improvement, but a perfect cure was not effected, and plaintiff now finds it necessary to wear steel braces to support the foot; plaintiff had received a letter from the state agent of the defendant company, dated September 7, 1897, requiring him to "call at once upon Dr. James F. Hughes of Clifton Forge, Virginia, surgeon of this company that he may make an examination and report your injuries"; when Dr. Hughes came he told the plaintiff he had been sent there by the insurance company both to make an examination of the foot and to give it treatment; when the cast was taken off and the foot examined he said he thought it was getting along all right and he could see nothing the matter with it, and plaintiff thought it was

getting along all right until he attempted to walk on it; he did not hesitate to make the attempt when told to do so, as he wanted to know how it was; and that plaintiff may have asked Dr. Hughes what sort of treatment he should give the foot but does not remember.

Dr. Hughes testifies substantially as follows: He is a physician and surgeon of thirty years' experience and was then, and had been for thirteen years, a surgeon of the C. & O. Ry. Co.; under direction from the defendant company and another insurance company, he went on the eighth day of October, 1897, to see Tompkins and make an examination and report his condition to the insurance companies; he had been there before when Tompkins was absent from home; he found plaintiff sitting in his room with his foot and leg encased in the plaster cast, told him what his business was, explained that he came under orders from the company, and that as the plaster cast was on the foot, he could only report what he saw; plaintiff asked him if he thought the cast ought to come off, to which he replied that he did not like to take it off; plaintiff then asked if he thought it had been on long enough, and after counting up the time, which was four weeks and five days, and some further conversation, plaintiff said he had first sent for witness, but as he was not at home, he had gotten Dr. Bonner to put the bandage on, and he had not been there for about three weeks and plaintiff did not like that, and told witness then, that if he saw proper, to take it off, and said, "Hereafter I want you to do ⁴⁸⁹ my practice and attend to my foot"; Dr. Hughes did not say he would do it, but took off the plaster cast, which he did not expect to do when he went there; he saw little or no swelling, but he did see a dark red spot on the foot which was very tender, and plaintiff looked at it and said, "I think I will soon be able to go to work again," and witness says he thought so too; Dr. Hughes suggested to him, just merely suggested, that he did not think it necessary to put the bandage back, and advised him to bathe the foot in hot water two or three times a day, rub it with the points of the fingers and subject it to passive motion by taking hold of it and working it gently; he did not tell plaintiff to throw away his cane and walk on his foot, but to use his crutches and not put the foot on the ground at first; Dr. Hughes had not then made up his mind to treat the foot, feeling a delicacy about interfering with the case, as plaintiff's regular physician had charge of it; he did not think, from the general appearance of the foot, that the

bandage ought to be replaced or he would have put it on; he was not acting for the company beyond the mere matter of examination and said nothing to justify a conclusion on the part of plaintiff that he was treating him as the physician of the company; his only duty was to visit, examine and report; after the cast was removed plaintiff called on Dr. Hughes two or three times, and the first time walked into the office with a stick or crutch at which witness expressed surprise and told him he ought not to walk on the foot; these visits were for the purpose of consulting him in relation to treatment, but no charge was made for it, as witness was the physician for the railway company and it was his duty as such to treat railway employes, for which he was paid by the railway company; he had made the examination in obedience to a letter from the state agent of the insurance company directing him to do so.

Dr. R. S. Wiley testified that, under direction from the state agent of the defendant company he called on the plaintiff January 4, 1898, to make a further examination of it, when he found it enveloped in a plaster of paris cast, which the plaintiff refused to permit him to remove under advice from Dr. McGuire and his legal adviser; and that plaintiff told him he might remove the cast and make the examination if he would replace it and put the foot back in the condition in which it was, but he declined ⁴⁹⁰ to do that. He further testified, that on the 6th of February, 1898, under direction of said state agent, he went to make another examination when he found the cast had been removed, and he did so, finding the foot considerably swollen in the instep and on each side thereof. When called in rebuttal, the plaintiff denied having made the statements attributed to him by Dr. Hughes.

Several physicians testified in the case as experts, as did also Doctors Bonner, Hunter McGuire and Stewart McGuire, who had personal connection with the treatment of the injury. All of them substantially agreed that the treatment first given the injured foot by Dr. Bonner was proper, and that the nature of the injury required the same or similar treatment.

Plaintiff in error excepted to the giving of the following instructions at the instance of the plaintiff below:

"1. The court instructs the jury that if you believe from the evidence in this case that Dr. J. F. Hughes, as the agent and representative, called upon the plaintiff by reason of the provision in the insurance policy issued by the defendant to the plaintiff, authorizing the defendant to have its surgeon make

such examination as he deemed proper, and that said Doctor Hughes, acting under said provision, did make an examination of plaintiff's foot and ankle, and that said Doctor Hughes made such examination and negligently and improperly failed to replace the plaster cast removed by him, and that such examination or failure to replace such cast, or a similar support, resulted in an injury to the plaintiff, then you should find for the plaintiff and assess his damages at what you deem proper under all the circumstances."

"2. The court instructs the jury that if you believe from the evidence in this case that the examination required in the insurance policy issued by defendant to plaintiff, comprehended and included by the practice of reasonably skilled surgeons such an examination as would leave the injury to plaintiff's foot and ankle and the cast about such injury in the same condition in which it was found by the defendant's surgeon, Doctor Hughes, who made such examination, and that said Doctor Hughes, as such surgeon, failed to leave said foot and ankle, and such cast and treatment therefor, in the condition he found them, and that by reason of said failure on the part of ⁴⁹¹ said surgeon an injury resulted to the plaintiff, then the defendant is liable therefor."

"3. The court instructs the jury that if they find and believe from the evidence that the defendant, through its agent, acting upon his own judgment, and not at the request or at the instance of the plaintiff, removed the plaster dressing from the plaintiff's foot before the plaintiff had entirely recovered, and without replacing said dressing, or substitute therefor, directed the plaintiff to use his foot, and that the use of the foot as directed, without any bandages, support or dressing, caused the injuries complained of, then the defendant is responsible for all damages sustained by the plaintiff, directly caused by the removal of the dressing and the use of the foot as aforesaid."

The clause of the policy under which the examination was made, and in connection with which the rulings of the court must be considered, reads as follows: "Any medical adviser of the company shall be allowed to examine the person, or body of the injured in respect to any injury or cause of death in such manner and at such times as he may require."

This confers upon the company a right of examination and nothing more. It also confines the authority of its agent within the same limit. That right, and the agent's authority, however, extend to the making of the examination "in such

manner and at such times," as the agent may require. It confers no right to treat the injury, and the insured was not bound to submit himself to any course of treatment at the hands of any physician, that the company might indicate. If he had bound himself to that, the obligation would have carried with it his voluntary submission to the ordinary risk to which the law holds all persons who submit themselves to treatment at the hands of physicians, and he could make the defendant company liable only upon such grounds as would enable him to recover damages from a physician employed by him. In such case, a physician is held to the exercise of such care, skill and diligence as are ordinarily possessed by the average of the members of the profession in good standing in similar localities, regard also being had to the state of medical science at the time: 22 Am. & Eng. Ency. of Law, 2d ed. 799; Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519; Lawson v. Conway, 37 W. Va. 159, 38 Am. St. Rep. 17, 16 S. E. 564.

This construction of the clause in question, which seems to ⁴⁰² be rather acquiesced in by counsel for plaintiff in error, undoubtedly creates the relation of master and servant between the defendant company and Dr. Hughes, and applies the principle, respondeat superior, between the company and Tompkins. "The term 'servant' as used in this sense, is not, however, restricted to persons engaged in menial, or even in domestic, service. It is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists": Thompson on Negligence, sec. 578. There was no contractual or other relation which forbade the absolute control of the agent in the exercise or the right of examination, except the power of the insured to refuse to permit it by surrendering his right to the indemnity due him under the policy. This he was not bound to do, the reserved right of examination being a reasonable provision, compliance with which, in the absence of negligence, would result in no detriment to anybody. He was entitled to insist upon the payment of his indemnity, and upon the use of care and skill in the exercise of the right of examination, if the company insisted upon that as a condition precedent, as it was entitled to do.

Having the right to examine in such manner and at such times, as it saw fit, the company did no unauthorized act in removing the plaster cast, if its removal was necessary or desirable in making the examination, and not injurious. As to this there is no controversy. Nor does it seem to be disputed that, in the absence of directions, or assent, to the contrary, on the part of the insured, it was the duty of the company's agent to replace the bandage. Clearly, it was, for by leaving it off the status was changed, and no right to make such change was given by the contract. In a sense, that would have been going entirely beyond a mere examination, and performing a work in the nature of a treatment of the wound. The contention of counsel for defendant in error well illustrates the importance of this restriction. Tompkins had sought medical advice and attention, and secured just the kind of treatment the nature of the wound required, according to the opinions given by the physicians and surgeons who testified in the case, and ⁴⁹³ had it not been disturbed, he, no doubt, would have fully recovered. Whether he so succeeded, by a wise choice in selecting the surgeon, or by mere accident, or whether it was due to the skill of the surgeon or a chance selection of a remedy by him, is wholly immaterial. When the company went to him to make the examination, it found a condition a status, which it had no right to alter, and which it was bound to preserve, at the peril of having to answer for any injury that might result from disregard of duty in that respect, whether foreseen and contemplated as such result or not. It is not a case of breach of contract by nonperformance. It is an act beyond, and outside of, the contract, working injury and intent or knowledge is not a material element in such a case. "The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, although such an injury may have been purely accidental and unintentional. To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant; but the mere lawfulness of the act from which the injury resulted is no excuse for the negligence, unskillfulness, or reckless incaution of the party": *Tally v. Ayers*, 3 Sneed (Tenn.), 677; *Cate v. Cate*, 44 N. H. 211; *Bruch v. Carter*, 32 N. J. L. 554.

To this view and interpretation of the contract, the plaintiff below adhered in the progress of the trial, and the circuit court regarded it as sufficiently supported by the terms of the contract and the evidence introduced by the plaintiff to call for its submission to the jury, as one theory of the case, which should govern and control them in finding a verdict, if they should find the facts to be as contended by the plaintiff, accordingly gave the three instructions above quoted, all of which are in perfect accord with that theory, and the law as hereinbefore stated.

The defendant below held to a different theory which, it must be admitted, is, partially, at least, expressed in the following instruction, given as instruction requested by the defendant below and modified by the court:

494 "1. The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of the removal of the plaster cast from his foot, requested Dr. J. F. Hughes to treat him for his injury, and that the said Hughes, upon said request and with the consent of the plaintiff, and not at the instance and with the approval of said Hughes, removed said cast, and then gave plaintiff directions how to treat and use his said injured foot, that then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant."

"3. The court instructs the jury that the principal is not responsible for the acts of its agents outside of the scope of his agency, and that all parties dealing with an agent are bound to know the scope of the agency, and if the jury believe from the evidence that the authority and power of Dr. J. F. Hughes from the defendant company was limited to an examination of and report upon the injuries sustained by the plaintiff, and plaintiff was bound to ascertain the extent of said Hughes' authority to represent the defendant company, and in so far, if at all, he permitted any action by, or acted upon any advice of said Hughes, not embraced in said authority, he cannot for such advice or action, or for injuries resulting therefrom, recover damages from the defendant."

"8. The court instructs the jury that if they believe from the evidence that the injury complained of was the result of treatment by Dr. Hughes at the request of the plaintiff, and not at the instance and upon the advice of said Dr. Hughes, then the plaintiff cannot recover."

The first of these was modified only to the extent of inserting the words "from his foot," the words, "and not at the instance and with the approval of said Hughes," and the words, "and the jury should find for the defendant." The only modification of defendant's instruction No. 3 was the striking off from the end of it the words "but that in such case, the right of action by the plaintiff, if any, is against the physician alone." Defendant's instruction No. 8, as requested, was modified by inserting the words, "and not at the instance and upon the advice of said Dr. Hughes, then," before the words, "the plaintiff cannot recover."

Defendant's instruction No. 5 was given and reads as follows: ⁴⁹⁵ "The court instructs the jury that if the directions of the principal to his agent are specific, to do some specific thing, and the agent disregards his specific instructions, and goes about doing something else not reasonably within the scope of the authority given, the principal will not be liable for such acts of the agent, unless they are afterward satisfied by him."

As to the modification of instruction No. 3, there can be no cause for complaint. It remained unchanged, save only that the suggestion that plaintiff might have a right of action against Dr. Hughes was stricken out. In so doing, the court rightfully eliminated an irrelevant and immaterial issue injected, to the benefit of which the defendant was not entitled, and which could have performed no function other than to mislead and confuse the jury.

The other two modifications consisted of the insertion of the clause, "and not at the instance and upon the advice of said Dr. Hughes," and the clause, "and at the instance and with the approval of said Hughes," which are in substance the same. In order to throw upon the plaintiff the responsibility of the consequences of the removal of, and failure to replace, the plaster cast, was not the defendant bound to show that it had not been removed at the instance of its agent, he having actually taken it off? Plaintiff was bound to consent to its removal, if the agent demanded that it come off, for the contract required him to allow the examination in such manner as the agent required. Mere consent on the part of Tompkins was not enough to relieve the defendant from responsibility. It must have been a consent without a previous, or contemporaneous, demand for the removal. Consent under such demand or request was within the strict letter of the contract. Had the defendant a right to an instruction exonerating it upon proof of less than it.

was bound to prove in order to be relieved? Can it complain of the action of the court in adding the omitted element of relief which the defendant was bound to establish? Complete refutation of these propositions is found in the mere statement of them. This point goes to the very root of the controversy. If the cast had been removed solely at the request of Tompkins, he would have no cause of complaint, either on account of its removal, or of the failure to replace it. It would have ~~496~~ been an act of his own volition. But the company had the right to take it off, and plaintiff was bound to accede to its demand, or, at least, could do so without forfeiting his right to have the examination made with requisite care and skill.

Plainly, the position of the defendant in error in the court below was that Tompkins had himself, independently of the clause in the insurance policy, and without any reference thereto, employed Dr. Hughes, or requested him to remove the plaster cast. If the evidence established that fact, then Dr. Hughes would have been the agent of Tompkins in performing that work, or, more accurately speaking, he would have been an independent contractor, employed by Tompkins. That is the gist of the argument in this court. First, it is insisted that, under the doctrine laid down in *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, and *Lawson v. Conway*, 37 W. Va. 159, 38 Am. St. Rep. 17, 16 S. E. 564, governing the relation and duty of the physician to his patient, the defendant is not liable, under the evidence in the case. Next, the principle enunciated in *Pearle v. West End Street Ry. Co.*, 176 Mass. 177, 79 Am. St. Rep. 302, 57 N. E. 339, is invoked. That case holds that a physician, who, at the solicitation of a street railway, examined a person, who, claiming to have been injured by the negligence of the company, had sued it, and, in making such examination, caused the plaintiff to try to stand on the alleged injured leg, in doing which he fell and afterward became afflicted with hysterical trouble, as an alleged result of the examination and fall, was not an agent or servant of the railway company, but was an independent contractor, for whose negligence the railway company was not responsible.

Passing, for the present, the question whether the present case assimilates itself to the Massachusetts case, and assuming that Dr. Hughes was not an independent contractor, unless it appears that the removal of the cast was not in pursuance of his request or demand that it be taken off, the inquiry is whether the question as to whose instance it was at which the

casing was removed, was fairly submitted to the jury by the instructions given for both plaintiff and defendant. If so, the court did not err in giving the instructions requested by the plaintiff nor in modifying, and giving as modified, the instructions requested by the defendant. There can be no doubt that the question was so submitted, nor that if instructions Nos. 1 and ⁴⁹⁷ 8, asked for by the defendant, had been given without such modification, a wholly different and improper question would have been submitted, namely, whether Tompkins consented, at the instance and upon the demand of the company, and not whether he directed the removal of the cast without such request.

Ten other instructions, asked for by the defendant, were refused, the whole number requested having been fourteen.

Instruction No. 2 so refused asked that the jury be told that if, before the examination, the question of removing the cast was submitted to the plaintiff for decision, and he asked for, and received, the advice of the agent, then the physician became his agent and was not the agent of the company. It was bad because it completely ignored the evidence relating to the practically admitted fact that a virtual demand had previously been made for the removal of the bandage.

Instruction No. 6 was on the subject of agency and the extent to which an agent can bind his principal. The court was not bound to give it because its subject matter is fully covered by instruction No. 3 which was given.

Instruction No. 7 states the law relating to the degree of care and skill due from physicians to their patients. It embodied law wholly inapplicable to the case. What Tompkins' rights were as against Dr. Hughes is not a proper inquiry in this case, as has been shown, and its submission would have tended to confuse and mislead.

Instruction No. 9 presented a mingling and confounding of the law embodied in No. 7 with the law of agency and would have been clearly misleading.

Instruction No. 10 was to the effect that the plaintiff was not bound to allow the removal of the cast, though demanded, and that, in consenting thereto, he exercised a choice, took the risk, and so cannot complain of the consequences. The construction given the contract entirely shuts out this contention.

Instructions Nos. 12 and 13 are to the effect that the treatment, or the giving of advice, by Dr. Hughes, was outside of his agency and no recovery can be had for injury resulting there-

from. Their subject matter is substantially embodied in instruction No. 3, which the court was not bound to repeat. That instruction distinctly told the jury that if the plaintiff had acted ⁴⁹⁸ upon any advice of Dr. Hughes, not embraced in his authority, he could not, for such advice or action, or for injuries resulting therefrom, recover damages from the defendant. No. 3 said, if the jury believed that the agent's authority was limited to examination, he could not recover for treatment or advice. No. 12 said the same thing in slightly different language. Defendant cannot complain of its failure to ask the court to tell the jury, as matter of law, that such advice or treatment was beyond the scope of the agent's authority. No. 13 was actually bad because its last clause embodied the principle of No. 7.

By instruction No. 14 it was proposed to inform the jury that, if Dr. Hughes took the cast off, either at plaintiff's request or by his consent, and made the examination without then and there injuring plaintiff, he was not entitled to recover. For a reason several times repeated, this instruction was bad. It ignored a previous request by the defendant. It introduces, however, another element, namely, that if the mere examination did not injure, no recovery could be had. That was a ground entirely too narrow and wholly at variance with the contention of both sides. It was not pretended by anybody that the examination itself did any injury, but that injury resulted from leaving off the plaster cast after the examination. Hence, a submission of that question could have performed no function other than to lead to a confusion and distraction of the minds of the jury from the real question in the case.

Instruction No. 11 proposed the submission of a question somewhat different from that presented by the instructions already passed upon. It was that, if Dr. Hughes, as agent of the defendant, had given the plaintiff advice and instructions, such as a surgeon or physician would sanction, and that the plaintiff negligently failed to observe such instructions and advice, and that his negligence and disobedience, in that respect, had directly contributed to his injuries, he could not recover, though the jury might believe that want of skill on the part of Dr. Hughes also contributed to the injury. The instruction was properly refused because it does not state the law. Such negligence is no bar to the action, but may be set up in mitigation of the damages. This instruction did not say that the jury should reduce the quantum of damages which the plaintiff

would have been entitled to recover but for such negligence on his ⁴⁹⁹ part, as the defendant was entitled to have the jury instructed. It proposed that the court tell the jury he could not recover at all, if he had been guilty of such negligence: See Am. & Eng. Ency. of Law, 2d ed., 692.

Instruction No. 4 presents a question very different from any suggested by the other instructions. It reads as follows: "The court instructs the jury that while the law makes the plaintiff a competent witness in his case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to, and in view of the interest of the plaintiff." Under some circumstances, this instruction might be proper, if broad enough to be free from the objection of giving too much prominence to the fact to which it relates. But in view of the evidence in this cause, the instruction is open to that objection. No other witness had any pecuniary interest, perhaps, in the result of the trial, but Dr. Hughes, upon whose evidence and that of the plaintiff the vital question of facts in the case turned, had an interest in this, that if any negligence should be fixed upon his company, the result would be injurious to his principal, resulting from his negligence or over-zealousness, which would clearly affect him in a moral sense, at least. As the plaintiff was not the only witness interested, it would have been improper to instruct the jury to consider his interest in the controversy without directing attention to the interest of the witness on the other side of the case, upon whose testimony the defendant must win or lose. In *Phoenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353, just such an instruction as this was held bad upon the same ground.

As the case of *Pearle v. West End Street Ry. Co.*, 176 Mass. 177, 79 Am. St. Rep. 302, 57 N. E. 339, is relied upon as an authority controlling this case, a distinction between them is to be noted. In the Massachusetts case the court directed a verdict for the defendant. Just what the evidence was does not appear. In the opinion, it is said: "In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him." ⁵⁰⁰ In

another place the court says: "The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself into the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest and who had no authority of any kind." From the construction hereinbefore given to the contract, and from the evidence set out, it is equally clear that the two cases are not similar. There was no evidence tending to show that the plaintiff was under any obligation by contract or otherwise to submit himself to the examination made by the physician, nor that the physician had any right to examine him. All that was done was voluntary on the part of the plaintiff in the Massachusetts case, and not in submission to any duty he owed to the defendant.

Another case relied upon is *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, holding, upon the grounds that the laws required the vaccination of immigrants, and that a ship owner, who provides a competent surgeon whom the passengers may employ or not as they choose, is not liable for his negligence, that a foreign steamship company is liable in an action for assault and battery, predicated upon the action of the ship's surgeon in vaccinating an immigrant steerage passenger who made no objection to the operation. The principle of that case is manifestly distinct from the one governing the case under consideration. If the passenger was under any duty to submit to vaccination, it was a duty imposed by law. Moreover, it required a submission to treatment and surgical operation, not mere examination. If the law did not impose a duty, the court held that the evidence was such as to show that the plaintiff had voluntarily submitted to the operation and, of course, took the ordinary risk of injury, attendant upon such operations, even when the surgeon exercised the ordinary care and skill peculiar to his profession.

But one question remains, and that is whether the court, in overruling a motion for a new trial, erred. That depends upon whether the verdict is against the clear weight of evidence, as there is no error in the rulings of the court upon the trial. Only two witnesses testify as to the facts upon which the crucial question of the case turns. They are Dr. Hughes and the plaintiff. One swears positively that the plaintiff, without any ⁵⁰¹ solicitation or demand that the cast be taken off, directed it to be removed. The other swears equally positively that he yielded to the demand of the company's agent. Therefore, it

is simply a question as to which statement the jury ought to have accepted. Under such circumstances, there is not even a shadow of ground for saying that the verdict is against the clear preponderance of the evidence. To reverse the judgment on this ground, the court would simply be compelled to put itself in the place of the jury and say that it ought to have found the contrary of what it did find, notwithstanding the fact that evidence clearly warrants a finding either way on the question submitted.

There is no error in the judgment and it must be affirmed.

A Physician has been held to be an independent contractor when employed by a corporation to make a personal examination of a litigant, and the corporation held not answerable for any suggestions given by such physician to the litigant: *Pearl v. West End St. Ry. Co.*, 176 Mass. 177, 79 Am. St. Rep. 302, 57 N. E. 339. But see *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. Ry. 880, and cases cited in the cross-reference note thereto.

The Liability of Physicians and surgeons for negligence and malpractice is the subject of a monographic note to *Gillette v. Tucker*, 93 Am. St. Rep. 657-669.

LOWTHER OIL COMPANY v. MILLER-SIBLEY OIL COMPANY. URPMAN v. LOWTHER OIL COMPANY.

[53 W. Va. 501, 44 S. E. 433.]

AN ORDINARY OIL LEASE, under which the Lessee is Required to Pay no Rent other than a share of the oil, and is given an absolute right to surrender it, is inchoate, contingent, and for the purpose of seach only, until oil or gas is found. If the lessee gets no oil, he acquires no vested interest, and, on the other hand, if he gets oil, he acquires a vested estate. (p. 1030.)

OIL LEASE—Estate, When Vests under.—When, under an ordinary oil lease, the lessee discovers oil, an estate vests in him. This result is not avoided by evidence tending to prove that the oil was not in paying quantity. Whether it is in such quantity is left to the judgment of the lessee. (p. 1031.)

AN OIL LEASE may be Lost by Abandonment.—Abandonment may be the more readily found in the case of oil leases than in most other cases. (p. 1032.)

OIL LEASE—Abandonment of, What Amounts to.—If a lessee of an oil lease bores wells in which oil is found in small quantities and in which pumps, though operated for months, produce not more than five barrels per day, no part of which is marketed, but all of which is allowed to run to waste, and all the appliances about the wells of any considerable value are removed, and wells bored in tracts some distance away produce gas only, and the field is what oil

men call "wildcat territory," and all work ceases for more than a year, these facts establish the abandonment of the lease, and their force as such is not destroyed by the fact that there are no pipelines in the immediate neighborhood by which the oil could be conducted to market. (p. 1033.)

OIL LEASES—"Paying Quantities" Defined.—If an oil lease is for a term of years and as much longer as oil and gas can be produced in paying quantities, the term "paying quantities" means paying quantities to the lessee. If the oil pays a profit, however small, over operating expenses, it is produced in a paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase "paying quantities" is to be construed with reference to the operator and by his judgment when exercised in good faith. (p. 1033.)

SPECIFIC PERFORMANCE—Discretion of the Court.—An application for specific performance is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with his contract, and it will not be granted if it would be inequitable and work hardship upon the party against whom it is asked. If, since the contract, the value of the land has greatly increased, and the conditions changed, and the vendee is in a condition where the enforced performance would greatly damage him and especially where the purchaser is chargeable with the delay by reason of the failure to perform, equity will refuse to compel the vendor to convey. (p. 1035.)

SPECIFIC PERFORMANCE—Losing Right to by Long Delay and Permitting Adverse Interests to Grow up.—If one holding a contract for the purchase of lands delays for nine years completing payment of the purchase price, during which time he permits the vendor to remain in possession, and rents from him and pays rent for some years, and finally oil is discovered and the lands are greatly increased in value, and leases are made by the vendor for the purpose of permitting and encouraging the development of an oil field, and large expenditures are made thereunder with the knowledge of the purchaser and without his protest, he can no longer maintain suit for specific performance of the contract to convey. (p. 1036.)

SPECIFIC PERFORMANCE—Estoppel.—A person who stands by without making known his rights, and encourages and permits an innocent purchaser to negotiate an oil lease with the owner of the property and to thereafter incur great expenditure in the search for and developing of oil, is estopped from maintaining a suit against the land owner and such lessee to enforce a contract to purchase the lands entered into before such lease was made. (p. 1036.)

ORAL RESCISSION OF CONTRACT for the Purchase of Land. A contract for the purchase and sale of real property may be rescinded by word of mouth; if the contract is destroyed pursuant to agreement, or the possession is retained. The surrender to its maker of the rights contracted for is tantamount to its actual destruction. (p. 1037.)

SPECIFIC PERFORMANCE will not be Decreed of a Contract Made with Intent to Defraud Creditors. (p. 1038.)

A PURCHASER of an Equity Gets Only Such Title as the Vendor has.—Such a purchaser, knowing that the legal title is outstanding, is not a bona fide purchaser, and gets his equity subject to all defenses existing against it in the hands of his vendor. (p. 1038.)

NOTICE TO PURCHASER.—Actual Possession of Land is notice to a purchaser of the rights of a person in possession. (p. 1039.)

Reece Blizzard, Northcott & Perry and Mr. O'Brien, for the appellants.

T. P. Jacobs and John M. Hamilton, for the appellees.

⁵⁰³ BRANNON, J. Two chancery suits in the circuit court of Calhoun county were consolidated by order of the court (as I think they should not have been, as they involved distinct subjects), and were heard together, and a joint decree made in the two cases. One was a suit by the Lowther Oil Company against Miller-Sibley Oil Company; the other a suit by A. W. Urpman against the Lowther Oil Company. A joint appeal from that decree was taken by Urpman and Miller-Sibley Oil Company.

THE MILLER-SIBLEY CASE.

James Metz made a lease, 24 May, 1897, to Miles for oil and gas purposes of a tract of two hundred and fifty acres of land in Calhoun county. The lease was to continue three years from date "and as much longer as oil and gas can be found in paying quantities." It contained no provision for rental or forfeiture. It provided for payment to Metz of a royalty of one-eighth of oil produced, and two hundred dollars yearly for each gas well. It provided right to the lessee to remove machinery, and to "at any time surrender this lease and be relieved from all liability thereunder." Miles assigned the lease to Miller-Sibley Oil Company, and it bored a well and found some oil, but by reason of tools becoming fastened in the well or from an invasion of salt water, this well was abandoned, and another well was bored, and in it a small quantity of oil was found, its quantity being a matter of controversy, but say from two and three-fourths to five barrels per day. This well was pumped for oil. Two tanks were partly filled, ⁵⁰⁴ one of two hundred and fifty, the other sixty barrels. The quantity of oil does not appear. The first well was pumped some and a little oil obtained from it. The second well was pumped several months. The operations were suspended. The last pumping was in January, 1899; but a witness says that a little pumping was done in March, 1899. Some of the casing was pulled from the first well. Nearly all the casing was drawn from the second well and taken away. No tools were left. The rigs were left to decay. There were an engine and boiler left at the first well, but parts of the engine taken away, and then an order was given to Warden by the agent of the Miller-Sibley Company

authorizing him "to remove the engine, boiler and tanks, casing, tubing, sucker rods, etc." Warden at once moved the engine only. This order dates December 11, 1900. The two rigs were left and a boiler and some other articles used in the business. The company owned leases on other land in the vicinity, making up in all eight hundred or one thousand acres. This tract is stated in the lease to be part of a block of eight hundred acres of leased land owned by Miles. The company drilled two wells on these other lands in developing the territory. These wells were not far from the tract of two hundred and fifty acres. One of the wells produced gas, not oil. No royalty was ever paid to Metz by Miller-Sibley Company. On 9th of January, 1900, Metz executed to Lowther a lease of the same tract for oil and gas purposes, and Lowther assigned this second lease to the Lowther Oil Company, and in June, 1900, that company went upon the land and endeavored to utilize the first well which had been bored by Miller-Sibley Company, but failed, and then went to the second well bored by that company and cleaned and pumped it, but did not succeed in producing oil in paying quantity, only one barrel a day, and then bored it to greater depth and produced oil in paying quantity. Then the Lowther Oil Company brought a chancery suit in the circuit court of Calhoun county against Miller-Sibley Oil Company to restrain the latter company from entering on the land or interfering with the possession of the Lowther Oil Company of said land, and to declare the first lease, that made by Metz to Miles, no longer in force, and to cancel it. The decree of the circuit court avoided and canceled the first lease and the Miller-Sibley Company appealed. The first question is, whether there was any estate vested in Miller-Sibley Company when Metz made the second ³⁰⁵ lease. The lease requires no rent, only a share of oil, and gives absolute right to the lessee to surrender it, and under *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 27, 34 S. E. 923, gives no present vested estate, and might be ended at any time by either party, and a second lease would end it. That is the character of this lease. But when once the lessee under even such a lease begins work, whilst he yet has no vested estate, still he has right to go on in search of oil, and the lessor cannot then at mere will destroy his right. An ordinary oil lease, making the lessee pay a consideration, binding him to some obligation, vests only inchoate right, that is right to explore for oil, but no actual other estate than right to develop, and if he gets no oil, he still has no vested estate; but if he does get oil,

he has a vested estate. Such a lease calls for the right, not to oil in place, but to extract it: *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978; *Lowther Oil Co. v. Guffy*, 52 W. Va. 88, 43 S. E. 101; *Bryan on Petroleum and Gas*, 174, citing *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732; *Colgan v. Oil Co.*, 194 Pa. St. 234, 75 Am. St. Rep. 695, 45 Atl. 119. Just so with the lessee under a lease without rental or obligation after he has begun or after he has obtained oil. When he has obtained oil, he has a vested interest according to the lease. In *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655, in point 2 of syllabus, is language that "mere discovery of oil by exploration under it vests no title to it in the lessee." This language is inadvertent, and does not express the meaning intended, as on page 591, it is stated that discovery of oil does vest title. As above stated when Miller-Sibley Company discovered oil an estate vested in it according to the lease, which it could lose only by terms of the lease or by abandonment. It is said that the oil was not in paying quantity, and therefore no estate vested. Whether the oil is in paying quantity is left to the judgment of the lessee, and I do not see that where oil is found its quantity is material in deciding whether any estate vested under the lease. We must therefore see whether this estate has been lost. The lease contains no provision of express forfeiture. Under some circumstances of delay or fraudulent evasion of duty of development equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even if there be no express clause of forfeiture: *Crawford v. Richey*, 43 W. Va. 252, 27 S. E. 220; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Betman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bryan on Petroleum and Gas*, sec. 182; citing *Western* ⁵⁰⁶ *Pa. Co. v. George*, 161 Pa. St. 47, 28 Atl. 1004; *Elk Fork Oil Co. v. Jennings*, 84 Fed. 839. But this doctrine cannot apply under the facts of this case. We must inquire whether there has been an abandonment; for an oil lease can be lost by abandonment. The loss of valuable property by mere abandonment is not easily shown or readily held by the courts. "To constitute abandonment in respect of property, there must be a concurrence of intention to abandon and actual relinquishment of the property, so that it may be appropriated by the next comer." "In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no abandonment without the intention to abandon": 1 Cyc. 4,

5. It appears to me that abandonment may be more readily found in case of oil leases than in most other cases. An oil lease is a venture, a right of exploration only, giving its owner no other right, worthless if the search is not successful. In this instance Miller-Sibley Company bored a well, pumped it several months, got but little oil, not filling the tanks, abandoned that well. True, it is said that the tools getting fastened caused its abandonment; but it gave poor prospect. Then the company bored a second well, yielding from two and three-quarters to five barrels a day, though pumped for months. The company moved its tools and appliances off the Metz farm to other undertakings several miles away. It left nothing at the well very valuable to use in further efforts. The rigs remained; but in that timber country it would not be profitable to transfer them. The casing was mostly pulled out. An engine and boiler were left for a while, but the engine was partly dismantled, and later taken away. The agent gave an order to remove practically all left on the premises. He left the state. Wells bored on other tracts some distance away produced only gas. The search for oil in four wells in that section was unsuccessful. It was a new field, what oil men call in homely but expressive language "wild-cat territory." March 15, 1900, Lowther wrote Miller & Sibley saying that he held various oil leases in that section and proposing to put them in with those of Miller & Sibley, and on the 19th of March, 1900, Miller-Sibley Oil Company, by its president wrote in reply acknowledging receipt by date of this particular letter, saying: "We have decided not to operate in West Virginia, for the present, and consequently do not take advantage of your offer." ⁵⁰⁷ Miller-Sibley Company quit work January 1899, practically in November, 1898, and the Lowther lease was January 9, 1900. There had been a cessation of work for a year. The lease went to record March 19, 1900. The Lowther Oil Company began work in June, 1900, more than fifteen months after Miller-Sibley Company ceased work. The oil in the tanks was not marketed, but wasted; the derrick and other parts of the rig went to decay. These circumstances taken together establish abandonment by Miller-Sibley Company.

It is argued that there were no pipe lines nearer than ten miles to convey oil and that the company made fruitless efforts to get the Eureka Pipe Line Company to extend a line to that section. This would put in the lease a condition for excuse not in it. The first lease gave Metz not a cent of return except a share of oil. His motive in making it was therefore only development.

It is not reasonable, but unjust, that an oil company should thus bore two wells, discontinue work, remove implements, do nothing for a year, give plain sign of no intent to go on, and yet hold Metz's land tied up. How long would it remain bound up so as to prevent him from contracting with others to develop? True, this may not alone show intent to abandon; but it tends to show that we ought not demand any more evidence than is manifest in the case to establish abandonment. If, as is claimed now for the purpose of this case, oil in paying quantity was found, where did the company get the right to indefinitely suspend and not pay Metz his share of oil? Not from the lease. His right was to have the well worked or surrendered. Must we not conclude that the company regarded its search on this tract as vain and gave it up? "Title under an oil lease is inchoate and for purpose of exploration only until oil or gas is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned": *Calhoun v. Neeley*, 201 Pa. St. 97, 50 Atl. 967.

It is contended for the Lowther Company that oil was not produced in paying quantity, and that when it went upon the premises the three years' term of the first lease had expired. To this it is answered that the lease gave a term of three years "and as much longer as oil and gas can be produced in paying quantities." What is meant by that provision? It means paying quantity to the lessee. "If the well pays a profit, even small, ~~508~~ over operating expenses it produces in paying quantity, though it may never repay its cost and the operation as a whole may result in a loss. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator and by his judgment, when exercised in good faith": *Young v. Oil Co.*, 194 Pa. St. 243, 45 Atl. 121; *Bryan on Petroleum and Gas*, 109. The case further says that if oil or gas is not found, and the lessee is not willing to go on and incur further expense, the conditions stipulated for the termination of the lease has come. So, if he finds oil, but it ceases to pay expense of production. The lessor cannot determine whether oil is in paying quantity. Neither can a subsequent lessee. There is no strength in the argument that the lease ended alone from want of oil in paying quantity. Still, we may consider quantity in coming to a conclusion as to whether the lessee abandons.

It is suggested that the word "can" in this quantity phrase, is different from the word "is" commonly used. I do not see

any appreciable force in the suggestion. Does it impart a power in the lessee to leave the wells and premises indefinitely? I see no error in the decree so far as respects this case.

THE URPMAN CASE.

James W. Metz, father of John W. Metz, made a written agreement, January 22, 1892, selling and binding himself to convey to John W. Metz a tract of seventy acres of land, for eight hundred dollars, of which the document says four hundred and fifty dollars was paid in mules, cows, and a wagon, and for the balance John W. Metz gave three notes payable yearly thereafter, which agreement was recorded on its date. The tract is a part of the tract of two hundred and fifty acres leased by James W. Metz to Miles and then to Lowther and operated by Miller-Sibley Company, and then by Lowther Oil Company, as stated above in the Miller-Sibley case. By deed dated February 16, 1901, John W. Metz conveyed said seventy acres to A. W. Urpman. Urpman brought a chancery suit against Lowther Oil Company, James W. Metz and others to enforce specific performance against James W. Metz of said executory contract of sale made by James W. Metz to John W. Metz by compelling James W. Metz to pass a legal title to the seventy acres to Urpman. James W. Metz having leased the tract of two hundred ⁵⁰⁰ and fifty acres to Lowther for oil, including said seventy acres, and Lowther having assigned the lease to the Lowther Oil Co., and the said company having gone upon the premises and bored and found oil a short time before the date of the conveyance of the seventy acres from John W. Metz to Urpman, Urpman's chancery suit also sought to enjoin the Lowther Oil Company from taking oil, and to annul the lease under which it was operating as a cloud on Urpman's title. The Lowther Oil Company answered Urpman's bill relying upon the validity of the lease from James W. Metz under which it was operating, and in turn prayed that the agreement of sale between James W. and John W. Metz and the deed from John W. Metz to Urpman be canceled and annulled and declared void as to its rights. The decree did declare them void as to the Lowther Oil Company and James W. Metz, and Urpman appealed.

The contract between James W. Metz and John W. Metz being on record, the rights of Lowther and the Lowther Oil Company under the second lease would be later and subordinate to rights under that sale agreement, if enforceable. No possession was taken under it by John W. Metz. This is an important

fact bearing on delay in failing for more than nine years to enforce the agreement; for when a vendee is in possession delay is more excusable, and time does not so soon bar his right: *Abbott v. L'Hommedieu*, 10 W. Va. 678; *Pomeroy on Contracts*, section 404; 2 *Warvelle on Vendors*, sec. 746; *Tate v. Pensacola etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542; *Fry on Specific Performance*, sec. 738. When in possession we can almost say time is no matter; but when he is not, it is far different. Why, if he has a just right of possession is he not in? If John W. Metz had good claim for the seventy acres, why remain out of possession over nine years, and buy and live on another tract in the neighborhood, as he did? His delay constituted confession of no just right. The application for specific performance of a contract is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with the contract on his part, and it will not be granted if it would be inequitable and work hardship toward the party against whom it is asked: *Dyer v. Duffy*, 39 W. Va. 148, 159, 19 S. E. 540. The rule is more strictly applied in specific performance than in suits for account: *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. If since the contract ⁵¹⁰ the value of the land has greatly increased, and the condition changed, or the vendor is in a condition where enforced performance would greatly damage him, and especially where the purchaser is chargeable with the delay by reason of failure to perform, equity will refuse to compel the vendor to convey: *Booten v. Scheffer*, 21 Gratt. 474; *Patterson v. Martz*, 8 Watts, 374, 34 Am. Dec. 474; *Vail v. Nelson*, 4 Rand. 478. In volume 1, page 181, of that late valuable equity work, *American and English Decisions in Equity*, many instances of short delay barring relief are given and the subject discussed. "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced. An inequity founded on some change in the conditions or relations of the property or parties": *Galliher v. Caldwell*, 145 U. S. 368, 12 Sup. Ct. Rep. 873.

Let us pause to bring in some facts of the case in connection with these principles. The purchaser delays over nine years. He does not pay any of three hundred and twenty-five dollars deferred purchase money, and thus was never in a condition to call for a deed. About five or six years after the sale oil interests increase the value beyond comparison with the value of the land at the date of the sale. The purchaser still pays noth-

ing, but lets four more years go by without asking performance, he right near his father in the neighborhood, his father all the time in possession using the land as his own; this son and purchaser being weekly at his father's and knowing of his father's use of the land. In fact, he rents the land of his father one or two seasons for cropping, paying a share of the crop. His father leases the land to Miles for oil, and under the lease Miller-Sibley Oil Company bores two wells; the purchaser utters not a whisper against it, though well knowing it, and often visiting the land during oil operations. The father makes a second lease to Lowther under which the Lowther Oil Company develops oil, the purchaser present when this lease is made, well knowing of it, frequently on the land during the operations, standing by and seeing the oil company spend large amounts of money, and give forth not a whisper of a protest. Even when oil gushed out as from a cornucopia of wealth asking no deed from his father. Suppose this purchaser were himself to ask a court to compel his father to make a deed? What court would give him a deed? Urpman has only Metz's rights—no more. His father had made ⁵¹¹ a binding covenant by his second lease, which would ruin him, if broken by giving a deed to the son or Urpman. And then it would entail great loss on the Lowther Oil Company in favor of John W. Metz when he stood silent on the ground when it was spending thousands of dollars. As to the oil company a decree of performance would violate that principle of estoppel in pais which says: "No principle of equity seems better established, or more readily applied in equity than that if a person knowing his rights stands by and encourages or permits an innocent party to purchase his property or to make valuable improvements upon it without making known to such purchaser his rights in the property, is estopped from afterward asserting any claim to it": *Heavener v. Godfrey*, 3 W. Va. 433; *Norfolk etc. R. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. We must not think that the rights of a stranger to the contract are not to be considered in a contest as to its performance between its parties; for often the fact that its enforcement will impose loss on a stranger will deny a decree to enforce it, even where no such estoppel as that just mentioned is present: *Anthony v. Leftwitch*, 3 Rand. 238.

Another reason against the decree of performance is that the agreement of sale, if ever complete, was rescinded by both vendor and vendee. The contract states that the price of the land was paid in stock and a wagon and in these notes. James Metz

never got the stock, but his son took it off to Roane county and sold it for his own use, and he never executed the notes, and he never took possession of the land and he later surrendered to his father the written agreement. The motive of sale was base. John W. Metz being in debt, in order to get the personal property out of his hands away from creditors, to delay them until he should become able to pay them, went through the form of paying it to his father on the land, making a sale document and recording it. He did not deliver the personal property. Was it ever a consummated contract? It seems not. If so, no rights come from it. But pass that feature. They afterward rescinded. But was that oral rescission good? It is not a deed passing legal title. That can only go back by deed. Such a written contract may be rescinded by word of mouth, if the contract be destroyed pursuant to agreement, or possession be returned: *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998. Now, the ⁵¹²surrender to its maker of the written contract with intent to rescind is surely tantamount to actual destruction. "It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in affirming that a contract in writing may, in equity, be rescinded by parol; and this even though the contract may have been under seal. Such rescission may be effected not only by an express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract. It may consist either of words or acts, and all the circumstances attending the transaction may be shown to prove intention; but if evidenced by acts alone, they must be such as to leave no doubt as to such intention": 2 *Warvelle on Vendors*, sec. 826. See *Ballard v. Ballard*, 25 W. Va. 470, and *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. 780, holding these principles. Not merely James W. Metz, but John W. Metz, waived, abandoned and ignored this contract long ago, long before Urpman got his deed, and this abandonment defeats specific performance: *Payne v. Graves*, 5 Leigh, 561. "The rule seems to be well established that specific performance will not be decreed of a contract which the parties have treated as rescinded, or which has once been repudiated by the parties": *Warvelle on Vendors*, sec. 758. In section 759 such rescission is stated to be a bar to specific performance.

There is another all-sufficient ground to refuse Urpman specific performance. The contract which he asks equity to enforce is not executed, but executory. It was made with intent to defraud creditors, and equity will neither enforce nor cancel it but leave the parties alone. "This rule applies not only to the original parties to the fraudulent transaction, but also to their heirs and all parties claiming under or by title derived from them where no equitable rights intervene to protect such parties": *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612. See *Slifer v. Howell*, 9 W. Va. 391. There are other reasons, however, for a decree declaring this agreement void as to the Lowther Oil Company. It is true Urpman had no notice of the fraud infecting the sale contracts, but his deed conveyed only in equity, and a purchaser of only an equity gets only such title as the vendor ~~has~~ has. Such a purchaser knowing that the legal title is outstanding is not a bona fide purchaser like one getting legal title. The fact that the legal title is not in his vendor is notice of the risk he assumes in buying mere equity, and he takes only what his vendor can convey, or that which his vendor can call upon a court of equity to convey to him. He takes the equity with all its infirmities upon its head, subject to all defenses to which it was subject in the hands of his vendor: *Briscoe v. Ashby*, 24 Gratt. 478; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429, note, 433; *York v. McNutt*, 16 Tex. 13, 67 Am. Dec. 607.

In view of the several reasons ample of themselves to justify the decree denying Urpman relief by specific performance, I will add another equity principle, and that is, that specific performance in courts of equity is not a matter of absolute right, as arising from a debt of justice, but lies only in a sound discretion of the courts. The court has a right to look at all the circumstances and say whether justice and right demand a grant of performance of it: *Hogg's Equity*, sec. 396; *Abbott v. L'Hommedieu*, 10 W. Va. 677. Surely under all the facts we cannot say that such discretion was improperly exercised.

It is argued that as the sale agreement was on record, and the rescission of the agreement was not, the latter cannot prevail, as there is no notice to Urpman. The record of the agreement has nothing to do with the case. It would only concern purchasers from James W. Metz, not John W. It is no factor on the questions whether the agreement was rescinded, or was fraudulent, or whether there was laches. Of course, the rescission being oral, could not be recorded.

Under the above-stated legal principle that specific performance rests in the sound discretion of the court, in addition to the facts already given, as further reason to justify denial of relief to Urpman, I state that no injustice is done to him because he purchased when he had notice of the right of the Lowther Oil Company by their lease on the open record, by actual possession of the land by the Lowther Company, and by communications from John W. Metz. Why did he buy knowing of the possession of the Lowther Oil Company, and its operations? As Judge Green beautifully expressed the doctrine in *Frame v. Frame*, 32 W. Va. 478, 9 S. E. 907: "The earth has been described as that universal manuscript open to the eyes of all. When a man proposes to buy or deal ⁵¹⁴ with realty his first duty is to read this public manuscript, that is, to look and see who is there upon it, and what are his rights." Possession is notice to the world of the rights of the occupant: *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183. Besides notice constructive, Urpman was actually on the ground and saw the Lowther Company operating. And besides Urpman seeing the sale contract on record conceived the project of defeating the Lowther Oil Company by purchasing of John W. Metz, sent for him to come to Grantsville, and proposed to purchase of Metz, when Metz told him he had no right, did not own the land, but Urpman said, "We think you have," and insisted on buying, and had Metz to execute a deed with special warranty, he refusing to warrant, for the consideration of fifteen hundred dollars, when the land was worth thousands more, and it being then night, took a notary upward of three miles to Metz's home and got his wife's signature at the midnight hour, seeming fearful that the Lowther Oil Company or someone might intervene. He gave checks to one Matthews to hold till the notary returned with the deed. Metz says he was intoxicated. This is denied by evidence. But say that he was lured by this amount of money, to him, an unlettered mountaineer, a big sum. He soon repented of bringing trouble upon his aged, decrepit father, afflicted with dropsy, asked Urpman to take back his checks as he would lose nothing. It seems the money is in the hands of Matthews, and that Metz has never received it. These things Metz swears to, and Urpman did not go on the stand to deny. What has Urpman lost? Where is injustice done to him? Anyhow, no one is to blame but himself; for he, not John W. Metz, conceived the transaction and was the active agent. It was a speculation that failed. That is all.

We must therefore affirm the decree.

Oil Leases are considered in respect to their nature and construction in *McKnight v. Manufacturers' Nat. Gas Co.*, 146 Pa. St. 185, 28 Am. St. Rep. 790, 23 Atl. 164; *Wetengel v. Gormley*, 160 Pa. St. 559, 40 Am. St. Rep. 733, 28 Atl. 934; *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696, 44 Atl. 555. Lessees in an oil lease, who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land which cannot be taken away on any mere difference of judgment: *Colgan v. Forest Oil Co.*, 194 Pa. St. 234, 75 Am. St. Rep. 695, 45 Atl. 119.

Specific Performance rests in the sound discretion of the court, and may be granted or withheld upon a consideration of all the circumstances. It is a matter of grace, not of right, and will never be decreed where the equity of the case is not clear: *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 46 Atl. 340; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788; *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577. This discretion, however, is not arbitrary or capricious, but judicial: *Abbott v. Moldstad*, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227. As to a change in the value of the property as affecting the right to specific performance, see *Phinzy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207, 36 S. E. 796. Equity requires that a party seeking the specific performance of a contract to convey land shall not be guilty of laches or unreasonable delay: *Tate v. Pensacola etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 S. E. 542; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 S. E. 756; *Hatch v. Kizer*, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605.

PHILLIPS v. PINEY COAL COMPANY.

[53 W. Va. 543, 44 S. E. 774.]

LACHES—Defense of is Available upon Demurrer.—If on the face of a bill it appears that the complainant has been guilty of laches in asserting his rights, a demurrer should be sustained. (p. 1044.)

MARRIED WOMAN—Laches of.—If a married woman is authorized to act in respect to her separate estate as if unmarried, she is equally subject to the imputation and consequences of laches as if she were a feme sole. (pp. 1044, 1046.)

J. H. McGinnis and J. W. McCreery, for the appellees.

Brown, Jackson & Knight, for the appellants.

544 McWHORTER, P. Wilson Phillips was the owner of a tract of four hundred and thirty-five acres of land in Raleigh county and desiring to convey to his wife two hundred acres of the said tract, he and his wife on the 27th of May, 1879, by deed of that date, conveyed to Peter R. Wilson, the father of

Nannie L. Phillips, the wife of the grantor, a part of said tract described as follows: "Commencing at the mouth of a branch on Soak creek; thence following the stream until it empties into the waters of Piney river; then following the course of the waters of Piney river for the distance of two hundred and fifty poles; thence running in a northwesterly direction till it strikes the public road; thence following said road in a southeasterly direction till it strikes the branch of said creek, to place of beginning, containing two hundred acres more or less." At that time the grantor lived in Pennsylvania and the description of the land was made according to the recollection of the grantor. On the same day and by deed executed on the same sheet of paper Peter R. Wilson and Louisa, his wife, conveyed with general warranty, to Nannie L. Phillips the "same piece of land described in the first page of this deed," etc., but the call running from the end of the two hundred and fifty poles in the last-named deed was made to read: "Thence running in a southwesterly direction until it strikes the public road" instead of northeasterly, as in first deed. On the eighth day of January, 1890, Wilson Phillips and Nannie L. Phillips, his wife, conveyed to Azel Ford the tract of four hundred and thirty-five acres, describing the whole tract by metes and bounds, but "excepting from the above boundary a tract of land now owned by said Nannie L. Phillips and conveyed to her by Peter R. Wilson and wife by deed dated the twenty-seventh day of May, A. D. 1879." Then describing the land so excepted by the same description set out in the deed from Peter R. Wilson and wife to Nannie L. Phillips, which deed to Ford was recorded February 27, 1890. And by deed dated the third day of March, 1890, said Ford and wife conveyed, with general warranty, the said tract of land conveyed to him by said deed of the 8th of January, 1890, to Logan Bullitt, of Philadelphia, with covenants "to execute further assurances of their said lands and ⁵⁴⁵ other property, rights, privileges and easements aforesaid as may be required" which deed was recorded March 10, 1890.

By deed dated the fifth day of May, 1898, said Bullitt and his wife conveyed said land to the Piney Coal Company, of Raleigh county, with like further assurances, which deed was recorded on the twelfth day of May, 1898. At the March rules, 1900 (process having been issued January 2, 1900), Nannie L. Phillips filed her bill in the circuit court of Raleigh county against the Piney Coal Company, Logan and Bullitt, Azel Ford and Wilson Phillips, praying that the said deed of January 8, 1890,

made by Wilson Phillips and herself to Azel Ford be reformed so as to run in a northwesterly direction till it strikes the public road so as to give her the land described in the deed from her husband and herself to Peter R. Wilson and as laid down by Milton Curtis on a plat filed with the bill as an exhibit, she having had the same surveyed by said Curtis, and for general relief.

The defendant, Piney Coal Company, filed its demurrer in writing to plaintiff's bill setting up among other things for cause of demurrer that the said bill and exhibits show affirmatively that the tract of land claimed by plaintiff cannot be located, bounded and described as claimed by her, and that plaintiff had been guilty of laches in waiting ten years before bringing her suit and suffering successive transfers of the land in controversy to be made in the meanwhile, and should therefore be denied relief, also that said bill failed to show how demurrant claimed said tract of land should be located, bounded and described or what land, if any, of said plaintiff demurrant claimed. Defendants, Ford and Bullitt also demurred to the bill: which demurrers were overruled. The defendants, Piney Coal Company, Bullitt and Ford, filed their several answers to the plaintiff's bill, denying the material allegations thereof, to which answers plaintiff replied generally. Defendant Wilson Phillips also filed his answer admitting the allegations of the plaintiff's bill and asked that proper relief be granted in the premises to all the parties according to the facts given in the case.

Depositions were taken and filed by the respective parties and on the sixth day of November, a decree was rendered reforming the several deeds from Peter R. Wilson to Nannie Phillips and from Phillips and wife to Ford, from Ford to Bullitt and ⁵⁴⁶ from Bullitt to the Piney Coal Company, and appointed a surveyor to go upon the land and lay off two hundred acres more or less, to the plaintiff according to the description given in the deed from Wilson Phillips and wife to Peter R. Wilson, on May 27, 1879, the said surveyor to give the parties to the suit fifteen days' notice of the time of doing such work. From which decree the Piney Coal Company appealed.

The first question to be disposed of is the assigned error in overruling the demurrer. It is claimed that the plaintiff was guilty of gross laches in the delay that she made in bringing her suit, being quite ten years after the date of the deed to Azel Ford, and with no reasonable or sufficient explanation of such delay. Plaintiff held under the deed dated the 27th

of May, 1879, which was admitted to record July 6, 1879, so that from the time the mistake was made to the date of the institution of the suit, within a few months of twenty-one years; but whether she could be guilty of laches as between herself and her husband, is immaterial here, as the time which elapsed after making the deed to Ford is sufficient to be fatal in her case, if a married woman can be guilty of laches. The only explanation that she attempts in her bill to make of her long delay of ten years is that as soon as she ascertained that the defendant set up any claim to her tract of land described in the deed of May 27, 1879, she caused a survey to be made. She fails to even allege that she did not know of the mistake in the deed all the time. She does not say when she first knew of it. Was it not her duty to know of this mistake when her deed had been in her possession and of record all that time? Is she not bound to know what is in her deed? *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Badger v. Badger*, 2 Wall. 87. In the latter case Justice Grier, at page 94, says: "Now, the principles upon which courts of equity act in such cases, are established by cases and authorities too numerous for reference. The following abstract quoted in the words used in various decisions, will suffice for the purpose of this decision: 'Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern all courts of law in like cases, and this rather in obedience to the statutes than by analogy.

547 " 'In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

" 'The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his

rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' ”

All this time plaintiff remained passive permitting a succession of conveyances of the property according to the description in the conveyance made by her husband and herself to Ford, so that the property has passed into several hands since their conveyance. In *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507, it is held, syllabus, point 3: “He who elects to set aside his contract for fraud must bring suit for the property without unreasonable delay after the discovery of the fraud, unless there be good reason to excuse it; otherwise his delay will deny him relief.” And point 4, in same syllabus: “The defense of laches may be made by demurrer when the facts manifesting it appear in the bill.” This question of laches is well discussed in the case last cited, at page 229, 34 W. Va., and at page 511, 12 S. E. after citing *National Bank v. Carpenter*, 101 U. S. 567, where it is held: “Where it appears by the bill that the remedy is barred by lapse of time or by reason of laches he is not entitled to relief, the defendant may be denied to avail himself of the objection.” The ⁵⁴⁸ judge speaking for the court says: “I am convinced that this defense of laches is alone a complete bar to the plaintiff’s bill. The option dates April 19, 1881, the deed November 12, 1881, the suit in May, 1887, a period of more than six years from the date of the option and five and a half from the date of the deed. Decisions of this court furnish emphatic authority on this subject. *Trader v. Jarvis*, 23 W. Va. 100, holds that ‘delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as evidence of assent, acquiescence, or waiver; and especially in such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced in a court of equity.’ There was a delay of nearly seven years there.” In *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350, it is held: “A bill is bad on demurrer where it appears therefrom that there have been unreasonable delay and laches on the part of the complainant or those under whom he claims, in asserting the rights which he seeks to enforce.” And in *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610: “A

court of equity will not assist one who has slept upon his rights and shows no excuse for his laches in asserting them." And in *Greenlees v. Greenlees*, 62 Ala. 330: "It is settled in this state that in courts of equity lapse of time rendering a demand stale or statute of limitations, the bill disclosing that the claim or demand is obnoxious to either may be taken advantage of by answer or demurrer as well as by plea." See, also, *Bercy v. Lovrette*, 63 Ala. 374; *Sublette v. Tinney*, 9 Cal. 423. In 18 *American and English Encyclopedia of Law*, second edition, 107: "If a married woman is authorized to act in respect to her separate estates as if she were unmarried, she is equally subject to the imputation and consequences of laches as if she were a feme sole." In *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589, I quote from the opinion because it is so applicable to the case at bar under the changed conditions created by our statutes, as affecting the rights of married women: "At common law, while a married woman remained under the disability of coverture, she could not be guilty of laches. In equity she is considered in all respects as a feme sole in respect to property settled to her sole and separate use. Under the constitution of this state, her real and personal property, acquired in any manner, are and remain her separate ⁵⁴⁹ estate and property so long as she may choose, and can be devised, bequeathed, or conveyed by her the same as if she were a feme sole, and are not subject to the debts of her husband. Under our statutes property owned by her at the time of her marriage, or acquired by her afterward, is and remains her sole and separate property, and can be used by her in her own name, and is not subject to the interference or control of her husband. She can bargain, sell, assign and transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account; and her earnings from her trade, business, labor, or service are her sole and separate property, and can be used or invested by her in her own name. No bargain or contract made by her in respect to her separate property, or in or about her trade or business, under the statutes of this state, is binding upon her husband, or renders him or his property in any way liable therefor. She can be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her, and can maintain an action in her own name for or on account of her sole or separate estate or property, business or services, or for dam-

ages against any person or body corporate for any injury to her person, character, or property. In an action brought or defended by her in her name, her husband or his property is not liable for the costs thereof or the recovery therein. Whenever judgment is recovered against her, it can be enforced against her sole and separate property to the same extent and in the same manner as if she were sole. The statutes clothe her with the same property rights, and, with few exceptions, subject her to the same liabilities as her husband. She can manage her own property and bind herself by contract, with the exceptions of contracts to convey land, in respect to her property, separate trade, or business, as fully and to the same extent as he can. Vested with the rights of property and the right to sue and be sued possessed by her husband, she is subject to the same rules which restrict and control his rights. For this reason, it has been held by this court that she is barred by the statute of limitations which prescribes the time within which actions to recover land sold at judicial sales shall be commenced. For the same reason she can be guilty ⁵⁵⁰ of laches. The disabilities of coverture in respect to her separate property having been removed, she is to the same extent relieved of its consequences: *Steines v. Manhattan Life Ins. Co.*, 34 Fed. 441, 444; *Burkle v. Levy*, 70 Cal. 250, 254, 11 Pac. 643; *Morrow v. Goudchaux*, 41 La. Ann. 711, 6 South. 563; *Lewis v. Barber*, 21 Ill. App. 638, 641."

For the reasons herein given the decree must be reversed, and this court proceeding to render such decree as the circuit court should have rendered, doth sustain the demurrer and dismiss the bill.

That Laches is imputable to a married woman in respect to her separate property, see *Gibson v. Herriott*, 55 Ark. 852, 29 Am. St. Rep. 17, 17 S. W. 589. Estoppel against married women is the subject of a monographic note to *Trimble v. State*, 57 Am. St. Rep. 169-185.

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2. PARENT AND CHILD—Legitimation.—Conflict of Laws.—A statute purporting to make legitimate an illegitimate child can have no effect as against its father, who was not, when the statute was enacted, a citizen of, nor resident within, the state, though he was such citizen and resident when the child was born. (Mass.) *Irving v. Ford*, 447.

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7. NEGOTIABLE INSTRUMENTS—Purchaser for Value, Who is. The Payment of a Pre-existing Debt makes the holder a bona fide purchaser for value. (Mass.) *Boston Steel etc. Co. v. Steuer*, 426.

8. NEGOTIABLE INSTRUMENTS—Check—Holder in Due Course, Who is.—One named as a payee in a check drawn by a married woman and delivered by her to her husband to deliver to such payee in payment of her debt is a holder thereof in due course, though it is delivered to him by the husband in payment of the latter's own debt, where it was received without notice of the misappropriation by the husband. (Mass.) *Boston Steel etc. Co. v. Steuer*, 426.

9. NEGOTIABLE INSTRUMENTS—Holder in Due Course.—A pledgee of a check may be a holder in due course, under section 9 of the negotiable instruments act of 1898. (Mass.) *Boston Steel etc. Co. v. Steuer*, 426.

10. NEGOTIABLE INSTRUMENTS—Check Blank as to Amount. A check or bill of exchange in which a blank is left as to amount is an incomplete instrument, and the rights of a purchaser depend upon the real authority which the signer has in fact given in the matter, under the negotiable instruments act, and if delivered in payment of a debt to one person, when the instructions of the signer were to deliver it in payment of the debt of another, the application of the check to the payment of the debt of the former cannot be sustained. (Mass.) *Boston Steel etc. Co. v. Steuer*, 426.

11. EVIDENCE of Instructions Given in the Absence of the Person to be Affected.—Where a check, blank as to amount, is given by a wife to her husband, with instructions that he deliver it to the payee in payment of her debt, and it is in fact filled up as to amount and delivered in payment of the husband's debt, evidence of these instructions is admissible against the payee, though not made in his presence, nor brought home to his knowledge before receiving the check. (Mass.) *Boston Steel etc. Co. v. Steuer*, 426.

12. BILLS OF EXCHANGE—Liability of Purchasers or Payees.—One who has accepted or paid a bill of exchange drawn on him cannot defeat his acceptance by recovering the money paid because there was no consideration, or the consideration has failed as between him and the drawer, when the payee bought from the latter, for value, without notice of the defense. (Tex.) *S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank etc.*, 944.

13. NEGOTIABLE INSTRUMENTS—Indorsement.—Parol Evidence is Admissible, as between the immediate parties, to show the circumstances under, and the time at which a negotiable instrument was made. (W. Va.) *Young v. Sehon*, 970.

14. NEGOTIABLE INSTRUMENTS — Indorsements — Special Agreement Between the Parties.—Any agreement between the parties to a note bearing an irregular indorsement as to the extent of their liability may be shown by parol evidence, and may be enforced as to all who are parties to the agreement. (W. Va.) *Young v. Sehon*, 970.

15. BILLS AND NOTES—Non-negotiable—Liability of Indorsers, When Collateral to that of the Maker.—If a non-negotiable promissory note is indorsed first by the payee and next by another person, the undertaking on the part of the indorsers is presumed to be collateral to, and not joint with, the maker. (W. Va.) *Young v. Sehon*, 970.

16. BILLS AND NOTES—Non-negotiable Paper—Parol Evidence to Vary.—The rule against the admission of parol evidence to show the consideration, the relation of the parties, and the circumstances attending the execution of the paper, to the end that the true intent of the parties may be ascertained and effected, is not applicable to non-negotiable paper. (W. Va.) *Young v. Sehon*, 970.

17. BILLS AND NOTES—Non-negotiable—Makers and Indorsers—Parol Evidence to Show Respective Liabilities of.—If a non-negotiable promissory note is indorsed by the promisee and another in such manner as would make them first and second indorsers if the note were negotiable paper, evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note. (W. Va.) *Young v. Sehon*, 970.

18. BILLS AND NOTES—Non-negotiable—Maker and Indorsers—When Liable as Joint Parties.—Where a non-negotiable promissory note is drawn up by one person purporting to be payable to another, and is by the latter and another signed on the back as if they were first and second indorsers, for the purpose of procuring moneys for the benefit of the maker, the indorsement being to give him credit with such person as might accept it and furnish money upon it, the person so furnishing money may elect to hold all the parties as joint promisors, or to treat the indorsers as guarantors. (W. Va.) *Young v. Sehon*, 970.

19. NEGOTIABLE INSTRUMENTS—Release of Maker Without Affecting the Indorsers.—An agreement not to sue the maker of a ne-

gotiable instrument may reserve all rights against the indorsers. (Mass.) *Faneuil Hall Nat. Bank v. Meloon*, 416.

20. NEGOTIABLE INSTRUMENTS—Payment—Failure to Present, When Amounts to.—When a negotiable instrument is received in the conditional payment of a debt, the failure to present it for payment and to give notice of dishonor operates to make such conditional payment absolute. (Mass.) *Coleman v. Lewis*, 450.

See Banks and Banking; Husband and Wife, 4; Partnership, 5; Pledge.

BONDS.

See Principal and Surety.

BOUNDARIES.

1. BOUNDARIES—Government Survey.—The Lines actually run by the original government surveyors become the true boundaries, and, if they can be ascertained through the monuments they will control; and courses, measurements, plats, and field-notes must yield. (Iowa) *Rowell v. Weineman*, 310.

2. BOUNDARIES—Evidence of Where Monuments were.—In determining where monuments were established by the government surveyors, it is proper to consider the testimony of persons who saw them when discernible, evidence of their practical location at a time when presumably in existence, acquiescence of the parties concerned, acts of public authorities, boundaries of contiguous tracts, and reputation and tradition. (Iowa) *Rowell v. Weineman*, 310.

3. BOUNDARIES—Estoppel of Vendor to Deny.—If the owner of land points out the boundaries, and his vendee purchases believing them to be correct, the vendor is thereafter estopped to insist that they are incorrect and should be re-established in accordance with government plat and field-notes. (Iowa) *Rowell v. Weineman*, 310.

4. MEANDERED WATERS.—The Title of Abutting Owners on meandered waters extends, in Iowa, only to high-water mark, the title of the bed being in the state. (Iowa) *Carr v. Moore*, 292.

5. MEANDER LINES do not Establish Character of Area Beyond. The running of a meander line does not conclusively establish the character of the area beyond the line, as to whether it is river, lake, marsh, or unsurveyed land. (Iowa) *Carr v. Moore*, 292.

6. BOUNDARIES—Meander Line as.—A meander line is not, in a strict sense, a boundary, and the title of purchasers extends to the actual water line; but if there is no body of water corresponding to the meander line, to which the ownership of adjoining lands extends, then the meander line limits the extent of the land conveyed. (Iowa) *Carr v. Moore*, 292.

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BREACH OF CONTRACT.

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BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—Usury.—By-laws of a building and loan association fixing a minimum premium, greater than the legal rate of interest, at which loans may be made, are inconsistent with a statute requiring free and open competition in bidding for loans, and render a loan made thereunder usurious, although a larger bid is made therefor than the usurious rate arbitrarily made by such by-laws. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

2. BUILDING AND LOAN ASSOCIATIONS—Usury—Estoppel to Plead.—Although under a by-law of a building and loan association a loan made by it is usurious, yet if property covered by a deed of trust given to secure such loan is sold under foreclosure for default in payment of interest and premium dues, and the mortgagor solicits others to attend the sale and bid on the property, and himself attends and makes no objection to the validity of the loan or the manner of sale, he is estopped from setting the sale aside and the purchaser thereat takes title. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

3. TRUSTEES in Deeds of Trust.—An Officer of a building and loan association may legally become a trustee in a deed of trust given to secure a loan made by such association. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

CARRIERS.

1. CARRIERS—Limitation of Liability—Conflict of Laws.—If a contract containing a stipulation limiting liability for negligence by a common carrier is made in one state, but with a view to its performance by transportation through or into one or more other states, it must be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. Such contract, though valid in the state where made, must be declared void in the state where the injury occurs, if contrary to the policy of the law of the latter state. (Pa. St.) *Hughes v. Pennsylvania R. R. Co.*, 713.

2. CARRIERS—Limitation of Liability—Conflict of Laws—Interstate Commerce.—If a contract limiting the liability of a common carrier for loss or injury caused by negligence, though valid in the state where made, is void in the state where a loss occurs, and suit is brought, the court in the latter state may enter judgment for the full value of the property negligently lost, disregarding the terms of the contract, without in any way interfering with the legitimate exercise of interstate commerce. (Pa. St.) *Hughes v. Pennsylvania R. R. Co.*, 713.

3. CARRIER—Notice to Consignee of Arrival of Goods.—One who consigns goods to himself at a place where he does not reside nor have any agent, is not entitled to notice of their arrival. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.

4. CARRIER—When Becomes a Warehouseman.—When a cart shipped by railroad is destroyed by fire in the freight depot four days after reaching its destination, due notice of its arrival having been given the consignee, the liability of the railroad company, if any, is reduced to that of a warehouseman. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.

5. CARRIER—Goods Destroyed at Destination.—In an action to recover for goods shipped by railroad and burned in the freight house

at their destination, the jury, in determining whether the consignee had ample time to remove them before the fire, may consider the length of time between their arrival and the consignee's calling for them, and that notice was at once given him of their arrival. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.

6. CARRIERS OF PASSENGERS—Baggage, What is not.—Money not Intended to be Used for Traveling Expenses is not baggage, and, as to it, the common-law liability of a common carrier is not upon a carrier of the passenger to whom the money belongs. (Mass.) *Levins v. New York etc. R. R. Co.*, 434.

7. CARRIERS OF PASSENGERS—When not Liable as Bailee of a Passenger's Money.—If a passenger having a seat in a parlor-car visits its toilet-room, and leaves her purse on the window sill while she washes her hands, and returns to her seat without remembering it, such purse and the moneys therein are not intrusted to the carrier, nor is it even a gratuitous bailee thereof. (Mass.) *Levins v. New York etc. R. R. Co.*, 434.

8. CARRIER OF PASSENGERS—Liability of for Theft of an Employee.—If a passenger leaves her purse, containing money, on the window of a toilet-room of a car, and forgetting it, returns to her seat, and the purse and money are stolen by the car porter, the carrier is not answerable, where the money, not being intended to pay traveling expenses, is not baggage. Under these circumstances, no duty rests upon the carrier to care for the money. (Mass.) *Levins v. New York etc. R. R. Co.*, 434.

9. CARRIER—Duty to Protect Passengers.—A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence or injury by third persons. (Ga.) *Brunswick etc. R. R. Co. v. Ponder*, 152.

10. CARRIER—Duty to Protect Passenger from Arrest.—When a passenger on a train is being arrested by officers of the law, under color of authority, the railroad company is under no duty to inquire into the legality of the arrest. (Ga.) *Brunswick etc. R. R. Co. v. Ponder*, 152.

11. CARRIER—Liability for Arrest of Passenger.—When the arrest of a passenger is apparently regular, and there is nothing to put the railroad company on notice that the arrest is illegal, it is not liable for failing to interfere with the officers and prevent the arrest, or for stopping the train to allow the removal of the prisoner. (Ga.) *Brunswick etc. R. R. Co. v. Ponder*, 152.

12. CARRIER—Liability for Excessive Force in Arrest of Passenger.—If the arrest of a passenger on a train is made under such circumstances that the conductor may assume that it is lawful, the railroad company is not liable for excessive force used by the officers. (Ga.) *Brunswick etc. R. R. Co. v. Ponder*, 152.

13. RAILWAY CORPORATIONS—Passengers—On Whose Representations may Rely.—An intending passenger who inquires at a railway station of a ticket agent whether a train stops at another station, and also of the brakeman apparently in charge of the train, has the right to rely upon the representations and replies made by these employes, and hence to purchase a ticket for, and to go upon, such train for the purpose of being transported to such station. (Kan.) *Kansas City etc. R. R. Co. v. Little*, 376.

14. RAILWAY CORPORATIONS—Refusal to Stop Trains at a Station.—One who, after purchasing a ticket for a designated station, is ejected from the train because, by the rules of the corporation,

it does not stop at such station, may recover damages for such ejection. (Kan.) *Kansas City etc. R. R. Co. v. Little*, 376.

15. **RAILWAYS, Duty of to Protect Passengers from Assaults by Third Persons.**—When one has entered a depot and produced a ticket for the purpose of becoming a passenger, it devolves on the railway company and its agent to protect such passenger from assault and insulting conduct on the part of third persons, if the agent knows of such misconduct or has reasonable ground to anticipate it. (Tex.) *Houston etc. R. R. Co. v. Phillio*, 868.

16. **RAILWAYS, Duty of to Protect Persons Assisting Others to Become Passengers.**—If one goes to a railway depot with his wife, to assist her in taking a train, but without any intention of himself becoming a passenger, the railway company does not owe him the duty of protecting him while at the depot from assault or insulting conduct on the part of third persons. (Tex.) *Houston etc. R. R. Co. v. Phillio*, 868.

17. **CARRIERS—Duty to Passengers—Protection Against Strikers.** A carrier of passengers is not required to exercise the utmost care and vigilance to protect them from the criminal acts of strikers and strangers, not under its control nor subject to its orders. As to the acts of such persons, carriers of passengers are liable for the exercise of ordinary care and prudence only. (Minn.) *Fewinge v. Mendenhall*, 519.

18. **CARRIERS—Protection of Passengers Against Strikers.**—A carrier of passengers is charged with ordinary care and prudence only to guard them against the lawless acts of strikers and strangers not under its direction or control, and its failure to pull down the blinds of the car in which a passenger is riding or to stretch a heavy canvas over the windows of the car as a protection against such lawless acts, is not negligence for which a recovery can be had for personal injuries received. (Minn.) *Fewings v. Mendenhall*, 519.

19. **CARRIERS—Protection of Passengers Against Strikers.**—A carrier of passengers attempting to operate its cars during a strike of its employes is not guilty of negligence in failing to notify its passenger of the violent conduct of such strikers and their sympathizers, over whom he has no direction or control. (Minn.) *Fewings v. Mendenhall*, 519.

20. **CARRIERS.—The Reasonableness of a Regulation of a carrier, affecting the transportation of passengers, is a question of law for the court.** (Ga.) *Central of Georgia Ry. Co. v. Motes*, 223.

21. **CARRIERS—Right to Sleep in Waiting-room.**—A railway company may insist that such of its patrons as contemplate taking a morning train shall, if they desire to sleep, find quarters other than its waiting-rooms. (Ga.) *Central of Georgia Ry. Co. v. Motes*, 223.

22. **CARRIERS—Injury to Passenger by Employee.**—A passenger who persists in sleeping in a waiting-room contrary to a regulation of the railway company, and so exasperates an employe of the company as to unfit him for his duty, cannot complain that, instead of being ejected from the room, he was wrongfully treated with unnecessary harshness and then permitted to stay there. (Ga.) *Central of Georgia Ry. Co. v. Motes*, 223.

23. **RAILWAY CORPORATIONS—Passenger, Who is not.**—One who pays a brakeman for the privilege of riding upon a train, and is told to get on the platform of a baggage-car and to get off at stopping places for the purpose of keeping out of sight, is not,

while riding on such train, a passenger, nor is this rule made inapplicable by the fact that he was only fifteen years of age and did not know he was doing wrong, if it does not appear that he had not ordinary intelligence for his years, or that he lacked capacity to understand the transaction. (Kan.) *Mendenhall v. Atchison etc. Ry. Co.*, 380.

24. RAILWAY CORPORATIONS—Trespassers on Trains.—If one is on a train, not as a passenger, but as a trespasser, the corporation owes him no duty except to avoid willful and wanton negligence, and therefore is not answerable to him for injuries sustained by his stumbling over a semaphore board which was permitted to remain above the surface of the ground. (Kan.) *Mendenhall v. Atchison etc. Ry. Co.*, 380.

25. CARRIERS OF PASSENGERS—Liability of for Act of Brakeman in Pushing a Trespasser from the Train.—If one stealing a ride on a passenger train is injured by being pushed therefrom in a wanton and reckless manner by a brakeman, the carrier is answerable, if the jury believes that the brakeman, in what he did, acted within the scope of his authority. (Mass.) *McKeon v. New York etc. R. R. Co.*, 437.

26. RAILWAY CORPORATIONS—Exemplary Damages.—If a Passenger who has purchased a ticket for a designated station, after inquiring of the ticket agent whether the train stops at such station, is compelled to leave the train, on the ground that it does not carry passengers, he may recover exemplary damages, if, in the opinion of the jury, the defendant's employes were guilty either of malice, wantonness, willful oppression or violence, or of gross negligence. (Kan.) *Kansas City etc. R. R. Co. v. Little*, 376.

27. DAMAGES for Humiliation and Disgrace in Being Compelled to Leave a Railway Freight Train after taking passage thereon may be recovered, though no one was present at the expulsion but the conductor and a brakeman. Knowledge of such expulsion may reach others, and, if so, this is well calculated to humiliate and disgrace the plaintiff. (Kan.) *Kansas City etc. R. R. Co. v. Little*, 376.

28. PASSENGERS—Effect of Leaving Train.—A passenger does not lose his character as such by leaving the train at a regular station at an intermediate point in his journey. (Neb.) *Chicago etc. Ry. Co. v. Sattler*, 666.

29. PASSENGERS—Effect of Leaving Train.—One who, at an intermediate point in his journey, leaves the train at a place not intended for the discharge of passengers, and while the train is standing for some other purpose, assumes the ordinary risks incident to his action. (Neb.) *Chicago etc. Ry. Co. v. Sattler*, 666.

30. PASSENGERS—Effect of Leaving Train.—A Statute prescribing the liability of a railroad company to "passengers while being transported over its road," applies to those who leave a train, in the course of their journey, upon express or implied invitation from the company, for any necessary purpose incident to the journey, but not to those who leave for some purpose of their own not incident to the journey, and at a place not designed for the discharge of passengers, although the company may then, under certain conditions, owe them the duty imposed upon carriers by the common law. (Neb.) *Chicago etc. Ry. Co. v. Sattler*, 666.

31. PASSENGERS—Leaving Train for a Drink.—If a passenger, while his train stands at an intermediate station on a sidetrack to allow another train to pass, leaves his car to go to a pump for

a drink, and, hurrying back, is struck while crossing the main track by the approaching train, which he could have seen, he is not a "passenger being transported over the road" within the meaning of that term as used in a statute prescribing the liability of railroads to passengers, and the railroad is not answerable for his death. (Neb.) *Chicago etc. Ry. Co. v. Sattler*, 666.

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CHARITIES.

1. **CHARITIES, Public**—Funds for the Relief of Certain Societies.—Bequests to the trustees of the permanent fund of the Franklin Typographical Society and to a like fund for the sick and disabled members of the Teachers' Mutual Benefit Association, and also for the benefit of sick and disabled members of the Bank Officers' Association of the city of Boston are all bequests for public charities. (Mass.) *Minns v. Billings*, 420.

2. **CHARITIES, Public**.—Bequests for the benefit of the Massachusetts Society for the Prevention of Cruelty to Animals, and for the benefit of the Animals' Rescue League of Boston are bequests for public charities. (Mass.) *Minns v. Billings*, 420.

3. **CHARITIES, Public**.—A Bequest to the Proprietors of the Boston Athenaeum, a corporation established for the purpose of maintaining a valuable and extensive collection of such rare and valuable works, in ancient and foreign languages, as are not usually to be met with in our country, but which are deemed indispensable to those who would perfect themselves in the sciences, and for the purpose of forming a museum of natural and artificial curiosities and productions, scientifically arranged, is a bequest to a public charity. (Mass.) *Minns v. Billings*, 420.

4. CHARITABLE USES—Whether Governed by Common Law.—Charitable uses are enforced in Colorado in accordance with the principles of the common law. (Colo.) Clayton v. Hallett, 117.

5. CHARITABLE USE—City May Accept and Execute.—Under a statute enabling a city to take gifts by devise, and a charter providing for the assistance of charitable organizations and for the good order, health, good government, and general welfare of the city, it may take property in trust for the education of orphans. (Colo.) Clayton v. Hallett, 117.

6. CHARITABLE USE—What Law Governs City's Capacity to Accept.—The capacity of a city to accept a devise for a public charity is determinable by the state of the law at the time when the will, by its terms, is to take effect, and not at the time of the testator's death. (Colo.) Clayton v. Hallett, 117.

7. CHARITABLE USE—Indefiniteness of Beneficiaries.—A devise of property in trust to establish a college for educating "as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain," the executors being authorized "to promulgate such rules and regulations as they shall deem proper for the government of the institution," is not void for indefiniteness. (Colo.) Clayton v. Hallett, 117.

8. CHARITABLE USE—Designation of Beneficiaries.—The appointment of trustees with authority to control the institution, in a will devising property to establish a college for educating "as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain," carries with it, by implication, authority to designate the beneficiaries. (Colo.) Clayton v. Hallett, 117.

9. CHARITABLE USE.—The Education and Preferment of Orphans, being one of the subjects mentioned in the statute of 43 Elizabeth, chapter 4, is considered a public charity in Colorado. (Colo.) Clayton v. Hallett, 117.

CHATTEL MORTGAGE.

1. MORTGAGE OF CHATTELS.—A Provision Authorizing the Mortgagee to Take Possession on default of the payment of the debt contained in a mortgage of chattels is not against public policy, but is valid, and thereunder he is authorized to take such possession, though against the wish of the mortgagor. (Tex.) Singer Sewing-Machine Co. v. Rios, 901.

2. CHATTEL MORTGAGOR Estopped to Deny Ownership of Property.—A mortgagor of chattels, if he knew the contents of the instrument executed or was not deceived into signing it, cannot, in replevin for the property, be permitted to say that it did not belong to him. (Mo.) Layson v. Cooper, 545.

3. CHATTEL MORTGAGOR—Evidence that Property did not Belong to.—If a chattel mortgagor, in replevin for the property, tenders the issue that the deed was obtained from him by a fraudulent concealment of the fact that it purported to cover the property, and that he was ignorant of the fact when he signed the document, he may show that the property did not belong to him. (Mo.) Layson v. Cooper, 545.

See Fixtures; Judicial Sales.

CHECKS.

See Banks and Banking; Bills and Notes.

CHRISTIAN SCIENCE.

See Physicians and Surgeons.

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Circumstantial Evidence. See Evidence.

CLASS LEGISLATION.

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CLOUD ON TITLE.

See Quieting Title.

COLLATERAL SECURITY.

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COMITY.

COMITY.—The Statutes of One State are Enforced in another as a matter of comity, and never when inconsistent with the policy of its laws. (Mo.) *McGinnis v. Missouri Car etc. Co.*, 553.

COMMON LAW.

COMMON LAW—How Far in Force in Colorado.—The principles of the common law, as it existed in the fourth year of James I, are in force in Colorado. (Colo.) *Clayton v. Hallett*, 117.

CONFLICT OF LAWS.

See Carriers, 1, 2; Contracts, 20-23; Death, 3-5; Husband and Wife, 6; Judgments, 11; Telegraphs and Telephones; Usury, 2-5.

CONSIDERATION.

See Contracts.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW.—Courts Must Decline to pass upon the constitutionality of a statute under consideration unless it is necessary to do so to properly dispose of the question presented for determination. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

2. POLICE POWER—Limitations on.—The Legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights. The test, when such regulations are called in question, is whether they have some relation to the public health or welfare, and whether such is, in fact, the end sought to be attained. (Neb.) *Iler v. Rose*, 676.

3. CONSTITUTIONAL LAW—Sales in Bulk or of an Entire Stock of Goods.—A statute providing that the sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against creditors of the seller; unless five days before the sale, the seller and purchaser make a full

and detailed inventory showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller of each article included in the sale; and in good faith, make full, explicit inquiry of the seller as to the names and places of residence or place of business of each of the creditors, and at least five days before the sale, in good faith, notify, or cause to be notified, personally or by registered mail, each of such creditors of whom the purchaser has knowledge, or may, with the exercise of reasonable care, acquire knowledge, of the proposed sale and of the cost price of the merchandise, is a valid exercise of the police power of the state. (Tenn.) *Neas v. Borches*, 851.

4. CLASS LEGISLATION.—There is Nothing in the Constitution of the United States, or of Nebraska forbidding the classification of subjects for the purpose of legislation. (Neb.) *Farmers' etc. Ins. Co. v. Dabney*, 624.

5. CLASS LEGISLATION—Attorney's Fees Against Insurance Companies.—A statute authorizing the taxation of attorney's fees as costs when a judgment is rendered against an insurance company in an action on a policy covering real estate, is constitutional. (Neb.) *Farmers' etc. Ins. Co. v. Dabney*, 624.

6. CONSTITUTIONAL LAW—Class Legislation—When Sustainable.—A statute is not objectionable as class legislation because it applies only to merchants, if it is a mere regulation of mercantile business, designed to secure to the creditors of merchants a just participation in the distribution of their assets and prevent fraudulent transfers and practices by them. (Tenn.) *Neas v. Borches*, 851.

7. MUNICIPAL CORPORATIONS—Public Highways, Control of the Hours of Labor upon.—The Legislature may Provide What shall Constitute a Day's Labor for all workmen, mechanics, and other persons employed by or in behalf of the state, or any county, city, township, or other municipality therein, and that any officer or contractor violating the provisions of the act shall be punished by fine or imprisonment, or both; and such act applies to labor performed on the public streets of a municipality. (Kan.) *State v. Atkin*, 343.

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CONTRACTS.

1. CONTRACT—Past Consideration.—A Past Transaction, the obligation of which has been fully satisfied, will not sustain a new promise. (Ga.) *Davis & Co. v. Morgan*, 171.

2. CONTRACT—Moral Obligation.—Courts cannot Enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a consideration. (Ga.) *Davis & Co. v. Morgan*, 171.

3. **CONTRACTS.—Time is of the Essence of a Contract** when one party agrees to pay money to the other in consideration of the doing of an act by such other within the time specified. (Tex.) *Garrison v. Cooke*, 906.

4. **CONTRACTS, Time, When of the Essence of.**—If one party agrees to pay to the other a sum specified in consideration that such other will construct, equip, and operate a line of railroad and run trains between designated points on or before a day named, time is of the essence of the contract, and there can be no recovery thereon if the acts required do not take place at or before such date. (Tex.) *Garrison v. Cooke*, 906.

5. **CONTRACTS not to Engage in Business—When Construed to be Joint and Several.**—A contract by two parties signed in their individual names, agreeing not to enter into or conduct a milling business within a designated territory without the permission of J. H. or his assigns, binds each of such parties not to engage in such business, and is violated when one of them so engages, and both thereupon become liable for the resulting damages. (Tex.) *Raymond v. Yarrington*, 914.

6. **CONTRACTS—Acceptance by Mail—Right to Withdraw.**—Where a proposal has not been made by mail, its acceptance, though mailed by the proposer, remains within the control of the acceptor until delivery, and he may, by preventing the delivery of the letter, avoid the consummation of the contract. (Tex.) *Scottish-American Mortgage Co. etc. v. Davis*, 932.

7. **CONTRACT to Furnish Evidence—When Valid.**—If one has collected evidence under a contract of employment which does not render his compensation contingent upon the character of the evidence procured nor upon the result of any action in which it may be used, a subsequent contract by him to furnish that evidence to the plaintiff in an action in consideration of a specified interest in the amount recovered, is not void as against public policy. (Colo.) *Wood v. Casserleigh*, 138.

8. **CONTRACT to Furnish Evidence—Ownership of the Evidence.** If one is employed to collect evidence, and after the death of his employer contracts in his own name to furnish to another party the evidence obtained, the latter cannot, in a suit against him to enforce the contract, raise the question of ownership of the evidence. (Colo.) *Wood v. Casserleigh*, 138.

9. **CONTRACT to Furnish Evidence—When not Unconscionable.**—A contract with the plaintiff in an action to furnish evidence and provide for the prosecution of the cause, for an interest in the judgment recovered, is not unenforceable in equity on the ground that it yields a return disproportionate to the expenditures in time and money, when there has been no mistake or unfairness, and the party against which it is sought to be enforced has received and enjoyed the benefits. (Colo.) *Wood v. Casserleigh*, 138.

10. **CONTRACT—When not Opposed to Public Policy.**—Before a contract can be declared illegal because against public policy, it must clearly appear to be obnoxious to the pure administration of justice, or manifestly injurious to the interests of the public. (Colo.) *Wood v. Casserleigh*, 138.

11. **UNLAWFUL CONTRACTS—Relief.**—Courts do not lend their aid in the enforcement of rights growing out of a contract expressly forbidden by statute, but leave the parties to the unlawful contract where they find them. (S. C.) *White v. Commercial etc. Bank*, 803.

12. JURISDICTION, Contract Limiting, When not Against Public Policy.—A stipulation in a contract executed in a foreign country by a citizen and resident thereof on the one part and persons who declare a special residence in the same country, reserving exclusive jurisdiction in its courts of all questions arising under such contract, if legal and binding where it is entered into, is not objectionable in this country on the ground of public policy, and our courts will not refuse to give it effect. (Mass.) *Mittenthal v. Mascagni*, 404.

13. JURISDICTION, Contract Limiting to the Courts of a Foreign Country.—A contract made in Italy between a musical composer, who is a citizen and resident thereof, on the one part, and a firm who declare a special residence in Florence on the other part, for a tour by the former through the United States, and which stipulates that all controversies arising under the contract shall be determined only by the courts of Florence, is not so improvident or unreasonable that it will not be enforced in the courts of this country by their declining to exercise jurisdiction over actions brought therein contrary to the terms of such stipulation. (Mass.) *Mittenthal v. Mascagni*, 404.

14. JURISDICTION, Limiting Place of by Contract.—A contract made in a foreign country between a citizen thereof on one part and persons on the other part who, by the terms of the contract, declare a special residence in the same country, which provided that the contract in its form and substance is regulated by the laws of that country, and that any differences which may arise between the parties will be acted upon by the civil courts of that country, except that actions for compensation for services to be rendered under the contract may be brought in the state of New York, has the effect of giving the courts of the foreign country exclusive jurisdiction of all matters arising under the contract other than such actions for compensation. (Mass.) *Mittenthal v. Mascagni*, 404.

15. CONTRACT Opposed to Public Policy.—The Power of Courts to declare a contract void for being in contravention of public policy is very delicate and undefined, and should be exercised only in cases free from doubt. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

16. CONTRACT—Supervision by Courts.—Courts should be extremely cautious in supervising private contracts, when the law-making power has not declared them unlawful. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

17. CONTRACT—Whether Fraudulent Because Impossible.—It is only in an extreme case that a court should hold a contract of such a character that its performance is impossible or improbable, and therefore that those who entered into it must have done so with a fraudulent intent. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

18. CONTRACT—Construction in Favor of Legality.—It is not presumed that people intend to violate the law, and the language of their undertakings must be construed, if possible, so as to make the obligation one which the law recognizes as valid. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

19. CONTRACT—Construction by Party in Favor of Legality.—A construction in favor of the legality of a contract may be strengthened by the fact that one of the parties thereto has always placed that construction upon it. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

20. CONFLICT OF LAWS.—The place where a contract is delivered or first becomes a binding obligation, is deemed the place of the contract for the purpose of designating what law governs. (Ala.) *United States Savings etc. Co. v. Beckley*, 19.

21. CONFLICT OF LAWS—Place of Contract.—The Construction and Legal Effect of a contract are governed by the *lex loci contractus*, unless there is something indicating a different intention of the parties. (Mass.) *Mittenthal v. Mascagni*, 404.

22. CONTRACT—By What Law Controlled.—The law of the place where a contract is consummated by delivery or otherwise governs the construction of a contract made in one state to be performed in another, and not the place where it was signed. (Tenn.) *First Nat. Bank of Geneva v. Shaw*, 840.

23. CONTRACTS—Place of Execution.—A note signed in Tennessee and forwarded to the payee in Ohio, and by its terms payable in that state, is an Ohio contract. (Tenn.) *First Nat. Bank of Geneva v. Shaw*, 840.

24. CONTRACT—Liability of Third Person for Causing Breach of. Where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing such breach for the damages resulting therefrom. (Tex.) *Raymond v. Yarrington*, 914.

25. DAMAGES for Violating a Contract—Vagueness of Evidence.—When does not Preclude a Recovery.—Where a contract not to engage in a specified business has been violated, he who is damaged thereby is not precluded from recovering by the fact that his evidence does not show to what extent his business was diminished by the violation of the contract not to compete with him. To require accuracy in such a case would be to deny a remedy for the wrong. (Tex.) *Raymond v. Yarrington*, 914.

26. DAMAGES Allowable for the Breach of a Contract must not go beyond fair compensation for the total loss sustained and must be such as are the reasonable and probable consequences of the act complained of. (W. Va.) *Hurxthal v. Boom Co.*, 954.

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CORPORATIONS.

1. CORPORATIONS.—If any Statement in the Literature of a corporation is at variance with the contract which it finally makes with the holder of its certificates, what is stated in the certificate must control until the contract is reformed or rescinded. (Ga.) Equitable Loan etc. Co. v. Waring, 177.

2. CORPORATION—Collateral Attack on Charter.—If it appears from the articles of a corporation that it is duly organized and existing under the laws of the state, its charter cannot be attacked in a collateral proceeding. (Colo.) Union Pacific R. R. Co. v. Colorado Postal Telegraph Cable Co., 106.

3. CONSTITUTIONAL LAW Amendment of Charters of Banking Corporations.—Under a constitution declaring that corporations may be created under general laws, but that all such laws may be amended or repealed, the pre-existing law relating to banking corporations may be amended so as to provide the time within which subscriptions to their corporate stock must be paid. (Kan.) West v. Topeka Savings Bank, 385.

4. CORPORATIONS—Contracts Ultra Vires.—The general rule is, that if a corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation cannot be heard on a plea of ultra vires. (S. C.) White v. Commercial etc. Bank, 803.

5. CORPORATIONS—Contract Ultra Vires.—If a corporation, in violation of its charter, purchases stock in a bank, it is not liable to the creditors of the bank upon the insolvency of the latter, for bank stock subscribed and paid for and on which it has collected dividends. (S. C.) White v. Commercial etc. Bank, 803.

6. CORPORATIONS—Contracts Ultra Vires cannot be made the foundation for the liability of a corporation, nor can a corporation be made liable on a contract which the law prohibits it from entering into. (S. C.) White v. Commercial etc. Bank, 803.

7. CORPORATIONS—Right of Stockholder to Maintain Suit.—Before a minority stockholder in a corporation can maintain suit in his own name to redress supposed corporate wrongs, he must allege that he has made demand upon the managing officers or governing board of the corporation to correct the wrongs complained of, by legal proceedings or otherwise, and that, meeting with failure or refusal, he has sought redress through the stockholders as a body, or he must allege facts showing that such demand would have been useless. (Ala.) Johns v. McLester, 27.

8. CORPORATIONS—Stock When Paid up.—If incorporators pass no judgment upon the value of assets turned in as capital stock instead of money, such stock must be considered as paid up, only to the amount of the value of such assets when ascertained. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

9. CORPORATIONS—Liability of Stockholders.—Original stockholders, who make false statements as to the amount of capital stock actually paid into the corporation, cannot escape liability to its creditors who became such after a transfer of such stock. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

10. CORPORATIONS—Liability of Stockholders—Sale of Stock. Stockholders in a bank who in good faith transfer their stock to the cashier of the bank while it is solvent, with instructions to transfer it on the books of the bank, which is not done, are, in the event of the insolvency of the bank, liable to its creditors for the amount of the stock originally held by them. (S. C.) *White v. Commercial etc. Bank*, 803.

11. CORPORATIONS—Transfer of Stock—Power in Blank.—A certificate of stock in a corporation with a power of attorney to transfer, duly executed but in blank as to the date and name of the transferee, is in the position of merchandise prepared for market. The presumable intent of executing such power, is to put the holder in position to complete a sale by delivery of the certificate and transfer of the stock. Such transfer carries, *prima facie*, a good title. (Pa. St.) *Shattuck v. American Cement Co.*, 735.

12. CORPORATIONS—Transfers of Stock—Blank Power.—The business of a stock broker is to buy and sell corporate stock, and when a certificate of stock and power in blank to transfer are put into a broker's hands, the situation is exactly analogous to that of any merchandise prepared for market, and his transfer thereof vests, *prima facie*, a good title in the transferee. (Pa. St.) *Shattuck v. American Cement Co.*, 735.

13. CORPORATIONS—Transfers of Stock—Good Faith Purchasers.—The rights of a bona fide holder of stock in a corporation, as against the true owner thereof, to whom the apparent owner has either sold or pledged such stock, do not depend on the negotiable character of the certificates of stock, but, on the principle that one who has conferred upon another by written transfer all the indicia of ownership, is estopped to assert title, as against a third person, who has in good faith purchased the property for value from the apparent owner. (Pa. St.) *Shattuck v. American Cement Co.*, 735.

14. CORPORATIONS—Transfer of Stock in Blank—Bona Fide Holders.—If the owner of corporate stock voluntarily gives certificates thereof with blank assignment and power to transfer to his broker, who betrays the confidence reposed in him, such owner must suffer the loss rather than an innocent stranger whose money the broker is thereby enabled to obtain. This rule applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor, and if the pledgee pledges it to secure payment of his own debt, the second pledgee may hold it as security until his debt is paid. (Pa. St.) *Shattuck v. American Cement Co.*, 735.

15. CORPORATIONS—Stock—Blank Power to Transfer—Holder for Value.—A certificate of corporate stock accompanied by an irrevocable power of attorney to transfer, either filled up or in blank, is, in the hands of a third person, presumptive evidence of ownership in the holder, and if the person in whose hands the certificate

is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. (Pa. St.) *Shattuck v. American Cement Co.*, 735.

16. LIMITATIONS, Statute of, in Actions to Enforce Subscriptions to Corporate Stock.—If a Corporation Becomes Insolvent or ceases to do business having debts unpaid, it is the duty of its directors to enforce payment of subscriptions to its stock, and the statute of limitations, therefore, commences to run against the enforcement of such subscriptions or of any call therefor. (Kan.) *West v. Topeka Savings Bank*, 385.

17. LIMITATIONS, Statute of.—In an Action to Enforce Subscriptions to Corporate Stock Where the Corporation has not Become Insolvent, nor has It Suspended Business Leaving Debts Unpaid, the statute of limitations does not commence to run until a call has been made for the payment of such subscriptions, or of the part remaining unpaid, and for which the action is brought. (Kan.) *West v. Topeka Savings Bank*, 385.

18. LIMITATIONS, Statutes of—Actions for Subscriptions to Corporate Stock.—Where, by an amendment of the law relating to banking corporations, it is provided that not less than ten per cent of the residue of the capital stock shall be paid in each month after the bank shall be authorized to commence business, the statute of limitations commences to run against the collection of the assessments thus required to be paid in as soon as default in their payment occurs. (Kan.) *West v. Topeka Savings Bank*, 385.

19. CONSTITUTIONAL LAW—Corporation Stock—Obligation of Contracts.—The legislature may by law provide the time within which the subscriptions to the stock of corporations must be paid, and apply the rule thus prescribed to pre-existing corporations, where such law merely asserts a power which, before its enactment, had been left to the discretion of the board of directors of the corporation. (Kan.) *West v. Topeka Savings Bank*, 385.

20. CORPORATIONS—Actions on Subscriptions to Stock—Defenses.—If, in an action to enforce a subscription to corporate stock, it appears by the complaint that the call upon which the suit was based was made to raise funds to satisfy a specified debt, the answer must show that such debt has been paid. (Kan.) *West v. Topeka Savings Bank*, 385.

21. CORPORATIONS—Summons—Service of upon—Return, When Shows Inability to Find the Chief Officer.—A return on a summons that it had been served upon the assistant secretary, "the president and chief officer of said company not being found in my county," sufficiently shows the inability to find the chief officer. (Kan.) *Colorado Debenture Corp. v. Lombard Inv. Co.*, 373.

22. CORPORATIONS.—The Service of Summons on the Assistant Secretary of a Corporation is sufficient, where he is an officer provided for in the by-laws, with independent duties, in which are included the management of the office of the corporation at its only place of business within the state. (Kan.) *Colorado Debenture Corp. v. Lombard Inv. Co.*, 373.

23. CORPORATIONS—Summons—Service upon Officer Who has Resigned.—The service of a summons on an officer of a corporation who has resigned will be sustained, if the by-laws of the corporation provide that officers shall hold their offices for the time specified or until their successors are elected and qualify, and no successor has been elected. (Kan.) *Colorado Debenture Corp. v. Lombard Inv. Co.*, 373.

24. CORPORATION—Service of Garnishment on Agent.—An officer's return reciting that a summons of garnishment was served "personally on S. C. Hoge, agent in charge of the Central of Georgia Railway Company," does not show a service upon the corporation, but only upon Hodge in his individual capacity. (Ga.) *Burnett & Goodman v. Central of Georgia Ry. Co.*, 175.

25. JUDGMENTS Against Corporations—Effect on Stockholder—Collateral Attack.—A judgment against a corporation, if void, is not conclusive on a stockholder, but is subject to collateral attack. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

26. JUDGMENTS Against Corporations—Collateral Attack upon by Stockholder.—If a stockholder is able to show even aliunde the record that a judgment against the corporation is wholly void, he may do so as a defense to his liability as a stockholder. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

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COVENANTS.

1. COVENANTS.—A Covenant is Said to Run with the Land When either the liability to perform it or the right to enforce it passes to an assignee of the land. (W. Va.) Hurxthal v. Boom Co., 954.

2. COVENANTS—To Create a Covenant Real There must be Privity Between the Parties.—Otherwise it is simply a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees, or assigns. (W. Va.) Hurxthal v. Boom Co., 954.

3. COVENANTS.—A Covenant does not Run with the Land Unless contained in some grant thereof or of some estate therein. (W. Va.) Hurxthal v. Boom Co., 954.

4. COVENANTS REAL, Mere Words of Description cannot Create.—If a covenant is not in its nature and kind a real covenant, the mere declaration of the parties that it shall run with the land cannot make a real covenant, though so stated in the document. (W. Va.) Hurxthal v. Boom Co., 954.

5. COVENANT Binding the Land—Right of Assignee of Grantee to Recover upon.—Where, in a contract between the owner of lands and another, the latter agrees to maintain and keep in good condition certain dams for a consideration specified, and the contract declares that it shall continue in force for five years, and at the option of the land owner, his heirs, representatives, and assigns exercised within five years, the agreement shall continue in force for ten years from its date, the grantee or other successor to the title of such land owner may maintain an action against the other party to the contract for a breach thereof. (W. Va.) Hurxthal v. Boom Co., 954.

6. COVENANTS—Assignee of, Who is.—Where an agreement with a land owner stipulates for the maintenance and repair of certain dams for the benefit of his land, and purports to be in his

favor and that of his heirs, representatives, and assigns, one who, after his death, purchases such lands at a judicial sale is entitled to sue upon the agreement as "assignee." (W. Va.) *Hurxthal v. Boom Co.*, 954.

7. COVENANT—When a Breach does not Support a Recovery as for a Total Breach.—One suing for the breach of a contract to maintain a dam at a specified height for a designated number of years, and establishing such breach at a time anterior to the commencement of the action, is not entitled to treat the contract as abrogated, and to recover, in addition to the damages sustained up to the present time, also all future damages which the jury believe must necessarily result from such total breach down to the end of the contract. (W. Va.) *Hurxthal v. Boom Co.*, 954.

CREDITOR'S BILL.

See Receivers, 5.

CRIMINAL LAW.

1. CORPUS DELICTI may be Proved by Declarations and Circumstances and the order in which the evidence proving the material facts is introduced is not material. (Idaho) *State v. Alcorn*, 252.

2. CRIMINAL LAW—Circumstantial Evidence.—If evidence depended upon for a conviction is circumstantial, every fact necessary to connect the defendant with the commission of the alleged crime must be established to the satisfaction of the jury beyond a reasonable doubt, but this does not impose upon the prosecution the burden of proving every collateral or corroborative fact or circumstance in the case, beyond a reasonable doubt. (Idaho) *State v. Alcorn*, 252.

3. CRIMINAL LAW—Circumstantial Evidence.—In order to convict on circumstantial evidence alone, the circumstances relied upon must be proven to the entire satisfaction of the jury, and must be inconsistent with any other reasonable hypothesis than the guilt of the accused. (S. C.) *State v. Hudson*, 768.

4. CRIMINAL LAW—Appellate Practice—Instructions.—If an instruction on complicity in crime is correct as far as it goes, it is incumbent on the appellant to show that it was prejudicial to his rights and that necessity existed for an amplified statement of the doctrine. (S. C.) *State v. Hudson*, 768.

5. CRIMINAL LAW—An Erroneous Instruction Beneficial to, and not prejudicial of, the rights of the accused, is not ground for reversal of the judgment. (Idaho) *State v. Alcorn*, 252.

6. CRIMINAL LAW—Misdemeanor.—The refusal of a court to allow an accused to withdraw his plea of not guilty and to file a plea of misdemeanor is matter resting in the discretion of the court, and is not revisable on appeal. (Ala.) *Verberg v. State*, 17.

See Evidence.

CROPS.

See Judicial Sale.

CUSTODY OF CHILD.

See Parent and Child.

DAMAGES.

1. **DAMAGES.**—Punitive Damages cannot be Allowed in Actions on the Case. (W. Va.) *Hurxthal v. Boom Co.*, 954.

2. **DAMAGES FOR FRIGHT.**—There can be no recovery for fright resulting in physical injury, in the absence of contemporaneous injury, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. (Minn.) *Sanderson v. Northern Pac. Ry. Co.*, 509.

3. **DAMAGES.** Entire and Permanent, When Recoverable and When not.—If a cause of injury is in nature permanent, and the recovery for such injury would confer a license on the defendant to continue it, entire damages may be recovered in a single action; but where the cause is not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once a heavy recovery for entire, permanent, and lasting damages, including the future, damages cannot be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues to inflict damages. (W. Va.) *Hurxthal v. Boom Co.*, 954.

See Carriers, 26, 27; Contracts, 26; Death; Sales; Telegraphs and Telephones.

DEATH.

1. **DEATH.**—A Statute Giving a Right of Action for a homicide should be construed strictly. (Ga.) *Robinson v. Georgia R. R. etc. Co.*, 156.

2. **DEATH.**—The Mother of an Illegitimate Child has no right of action, in Georgia, for its wrongful or negligent homicide. (Ga.) *Robinson v. Georgia R. R. etc. Co.*, 156.

3. **DEATH**—Divisibility of Action for—Conflict of Law.—A statute creating a liability for wrongful death, and designating the person who may enforce it, is indivisible, so that the liability cannot be enforced in another state by a person not designated in the statute. (Mo.) *McGinnis v. Missouri Car etc. Co.*, 553.

4. **DEATH**—Who may Sue for—Conflict of Law.—Under the Illinois statute no one but the personal representative can maintain an action for wrongful death, and that representative cannot maintain an action in Missouri for a death occurring in Illinois. (Mo.) *McGinnis v. Missouri Car etc. Co.*, 553.

5. **DEATH**—Who may Sue for—Conflict of Law.—The Legislature cannot Authorize a person to enforce in the courts of the state a liability for wrongful death created by the laws of another state, when such person has no right to enforce such liability in the courts of the latter state, for such a law would be tantamount to an extraterritorial enactment. (Mo.) *McGinnis v. Missouri Car etc. Co.*, 553.

DEDICATION.

1. **DEDICATION**—Streets.—If a person plats land, setting apart certain portions thereof as streets, and sells lots with reference to such plat, he irrevocably dedicates the land designated thereon as streets, squares, or commons, to the public for public use. (Ala.) *Roberts v. Mathews*, 56.

2. DEDICATION—Streets—School Land—Nuisance.—If school commissioners are authorized to survey, plat, and sell, state school lands, and lots are sold with reference to such plat when made, there is an irrevocable dedication to the public of streets, alleys, and public squares laid out on such plat, and the subsequent obstruction thereof constitutes a public nuisance which may be abated by a lot owner who is especially injured thereby. (Ala.) *Roberts v. Mathews*, 56.

DEEDS.

1. CONVEYANCE—Quitclaim Deed—Parol Evidence to Vary Effect of.—Evidence is not admissible to show that a quitclaim deed did not pass all the title vested in the grantor at the time of its execution. (Tex.) *Cauble v. Worsham*, 871.

2. DEEDS—Successor in Interest.—An admission in the pleadings that a party is the "successor" of an unincorporated society should be construed to mean "successor in interest," and there is no need of introducing evidence on the subject. (Iowa) *Truth Lodge No. 213 etc. v. Barton*, 303.

See Covenants; Husband and Wife.

Note.

Definition of *res gestae*, 802.

DEMURRER TO EVIDENCE.

See Trial, 2, 3.

DESCENT AND DISTRIBUTION.

DESCENT AND DISTRIBUTION.—A Money Judgment in favor of the wife and five sons of a deceased, to be apportioned among them according to their respective interests as heirs under the laws of descent in Colorado, entitles each child to a one-tenth interest in the judgment. (Colo.) *Wood v. Casserleigh*, 138.

DIVORCE.

1. MARRIAGE AND DIVORCE—Alimony—Assignment of.—A wife's claim for alimony upon divorce is purely a personal, and not in any sense a property, right, and is not susceptible of assignment by her to another, nor capable of enjoyment by her in anticipation. (N. J. Eq.) *Lynde v. Lynde*, 692.

2. MARRIAGE AND DIVORCE—Alimony—Contract to Charge.—Alimony granted upon divorce cannot be subjected in advance to a charge in favor of the attorney through whose services it is awarded, because the subject matter is not capable of assignment, and because a contract to such end is opposed to public policy. (N. J. Eq.) *Lynde v. Lynde*, 692.

3. JUDGMENTS FOR ALIMONY are Liens on Homesteads.—A Judgment for alimony in favor of a wife is a lien on the family homestead, the title whereof is in the husband. (Neb.) *Fraaman v. Fraaman*, 650.

See Parent and Child.

DOMICILE.

See Parent and Child, 3.

DOWER.

1. **DOWER—Assignment of—Effect on Rents.**—After dower is assigned the seizure of the widow relates back to the date of the death of her husband, and she is entitled to the rents of the land due before as well as after the assignment of dower. (Ala.) *Bettis v. McNider*, 59.

2. **DOWER—Assignment of—Effect on Rents Transferred.**—An administrator's right to the possession of the lands of his intestate is subordinate to the widow's right of dower, and he can never acquire any title as against her to the rents arising from that portion of the estate assigned as dower so as to convey a superior title thereto to another by a transfer to him of the tenant's obligation, and the widow, after assignment of dower, has a right to recover the rents received by such transferee, in an action for money had and received. (Ala.) *Bettis v. McNider*, 59.

EIGHT HOUR LAW.

See Constitutional Law, 7.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Discretion in Locating Route.**—The discretion which a telegraph corporation may exercise in locating its line cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss which might readily be avoided. (Colo.) *Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co.*, 106.

2. **EMINENT DOMAIN—Telegraph Line, Leave of Towns to Construct.**—In proceedings to condemn land for a telegraph line over the right of way of a railroad, the fact that the line cannot be constructed through the towns along the route without their consent, is a question which does not concern the railroad company. (Colo.) *Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co.*, 106.

3. **EMINENT DOMAIN—Public Use and Necessity, Waiver of.**—The questions of public use and necessity for the taking in condemnation proceedings, are for the court, and if not presented to it for determination before the appointment of commissioners, are waived. (Colo.) *Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co.*, 106.

4. **EMINENT DOMAIN—Private Use, What does not Show.**—The fact that a corporation, seeking to condemn a right of way for a telegraph line, was organized for the purpose of selling or disposing of the lines which it might construct or acquire; and testimony offered that it is the creature of a foreign corporation, and has no intention to operate the line except in the interest of, and in connection with, that corporation, does not establish an intent in law to take the property for a private use. (Colo.) *Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co.*, 106.

5. **EMINENT DOMAIN—Telegraph Line—Public Use.**—A petition in condemnation proceedings for a telegraph line, which alleges that the petitioner is a corporation organized to erect and maintain lines of magnetic telegraph, is not insufficient in failing to show that the use of the line is to be public. (Colo.) *Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co.*, 106.

6. **EMINENT DOMAIN—Property Devoted to Public Use.**—A Telegraph Company may condemn a right of way over that of a rail-

road along which there is already a telegraph line. (Colo.) Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co., 106.

7. **EMINENT DOMAIN—Property Devoted to the Same Use.**—Property devoted to a public use may be condemned for the same or a different public use, when the uses for which it is already held are not thereby materially interfered with. (Colo.) Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co., 106.

8. **EMINENT DOMAIN.—The Title Acquired by a Telegraph company by condemnation proceedings in the right of way of a railroad is merely an easement, and damages for the taking should be assessed on that basis.** (Colo.) Union Pacific R. R. Co. v. Colorado Postal Tel. etc. Co., 106.

9. **EMINENT DOMAIN—Authority of Commissioners.**—Commissioners appointed in condemnation proceedings are not to determine the question of public use, nor the question of necessity for the taking, except as to the amount of land or the width of the right of way. (Colo.) Union Pacific R. R. Co. v. Colorado Postal Tel. Co., 106.

EQUITY.

1. **EQUITY.—If One of Two Persons, Who are Equally Innocent of Actual Fraud,** must lose, the one whose misplaced confidence in his agent or attorney has been the cause of the loss, cannot throw it upon another, but must stand it himself. (Pa. St.) Shattuck v. American Cement Co., 735.

2. **EQUITY—Dismissal of the Merits, When not Proper.**—Though a bill in equity is subject to demurrer because of defects therein, yet if the decree is not based alone on such defects and the bill is not dismissed for that cause, but on the merits, and the complainant declines to amend, the appellate court will reverse the decree, at the costs of the appellant, and remand the cause, with leave to amend the bill in the respects in which it was defective, or dismiss the suit without prejudice to the right to bring another action. (W. Va.) Fletcher v. Parker, 991.

3. **LACHES—Defense of is Available upon Demurrer.**—If on the face of a bill it appears that the complainant has been guilty of laches in asserting his rights, a demurrer should be sustained. (W. Va.) Phillips v. Piney Coal Co., 1040.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

1. **ESTOPPEL cannot Exist** unless the person who alleges it relied upon some representation of the other, and was induced to act by it, and thus relying and induced did take some action. (Mo.) Rosencranz v. Swofford Bros. etc. Co., 609.

2. **ESTOPPEL IN PAIS—Waiver.**—Although an estoppel in pais must generally be pleaded as a defense, such defense may be waived by the plaintiff in the case by proceeding with the trial without objection as if such defense relied upon had been pleaded. (Mo.) McDonnell v. De Soto Savings etc. Assn., 592.

See Husband and Wife, 8.

EVIDENCE.

1. **LAWS, Foreign, Presumption of.**—The law of a foreign country will be presumed to be the same as our own. (Mass.) *Mittenthal v. Mascagni*, 404.

2. **EVIDENCE—General Repute.**—The Official Standing of a person cannot be proved by evidence of general repute, but evidence of such repute may, in the discretion of the trial court, be received in connection with other testimony, to show that the pledgor of a negotiable instrument as collateral security had waived its presentment for payment by the pledgee and the giving of notice of its dishonor. (Mass.) *Coleman v. Lewis*, 450.

3. **EVIDENCE.**—Answers to Hypothetical Questions, based upon facts which the evidence then before the jury tends to prove, are properly admitted in evidence. (Idaho) *State v. Alcorn*, 252.

4. **EVIDENCE**—Statement of a Party to the Suit, When Admissible to Corroborate His Testimony.—When, on cross-examination of a party to a suit, he is questioned concerning statements made by him in which he did not mention a promise which he claims to have been made to him, and his original complaint is also offered in evidence to show that no allegation of such promise was contained in it, it is proper to receive evidence of the attorney who drew such complaint to the fact that the plaintiff, in his statement of the case, did mention such promise. Such testimony tends to show that the failure to rely on the promise in the complaint was due to the attorney. (Tex.) *Gulf etc. Ry. v. Garren*, 939.

See Contracts, 7-9; Criminal Law; Trial; Witnesses.

Note.

Evidence, circumstantial, advantages and disadvantages of, 773.

circumstantial, attempts to bribe jailors, 784.

circumstantial, civil actions, admissibility of in, 802.

circumstantial, civil actions, sufficiency of in, 802.

circumstantial, classification of, 773.

circumstantial, comments by the court upon, when and what permissible, 799-801.

circumstantial, corpus delicto may be proved by, 786-788.

circumstantial, degree of proof required for each circumstance, 779-781.

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circumstantial, failure to explain suspicious circumstances, 783.

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circumstantial, flight is admissible as, 784.

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- circumstantial, instructions concerning possession of stolen property, 792.
- circumstantial, instructions concerning proof of each separate circumstance, 796.
- circumstantial, instructions concerning the exclusion of every other reasonable hypothesis but guilt, 794.
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EXECUTIONS.

1. EXECUTION SALE—Determining Debtor's Interest in the Land—Apportionment of Liens.—A statute authorizing appraisers in determining a judgment debtor's interest in land for the purpose of judicial sale, to deduct the amount of all liens, does not confer authority to deduct a part of the liens, or apportion them upon the several parcels of the entire tract, to determine his interest in any one parcel. (Neb.) *Fraaman v. Fraaman*, 650.

2. EXECUTION SALE—Adjournment and Readvertisement.—There are no statutory provisions for the adjournment of an execution sale, in Nebraska, either by the court or the sheriff; and if a sale does not take place as provided by the notice, it should be readvertised. (Neb.) *Fraaman v. Fraaman*, 650.

Note.

Execution and Judicial Sales, adjournment of, authority of officer to order, 654.

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EXECUTORS AND ADMINISTRATORS.

1. FUNERAL EXPENSES—Implied Promise to Pay.—One who furnishes reasonable burial equipment should be allowed the value thereof from the estate of the deceased, although it was not ordered or authorized by the administrator. (Iowa) *Foley v. Brockmit*, 824.

2. FUNERAL EXPENSES—Excessive Allowance for.—An undertaker's bill for five hundred and twenty-six dollars is excessive, and an allowance thereof by the jury for four hundred and fifty-five

dollars will be disregarded by the court, when the deceased was a janitor, whose associates were mostly laboring men and whose estate was not worth over five thousand dollars. (Iowa) *Foley v. Brock-smith*, 324.

See Judgments, 12.

Note.

Executors and Administrators, adjournment of sales by, power of to order, 655.

EXPERT TESTIMONY.

See Evidence, 3.

Note.

Express Companies, liability of, when becomes that of warehousemen, 100, 101.

liability of, when terminates, 100, 101.

FENCIBLES.

See Agistors.

FIXTURES.

1. **FIXTURES as Between a Mortgagee and a Vendor of Personal Property.**—Ordinary Portable Kitchen Ranges placed in each set of rooms of an apartment house under a contract between the owner of the house and the vendor of the ranges, with a stipulation that the title should remain in the latter until they are paid for, do not prior to such payment become fixtures as between him and a mortgagee of the house, and hence the latter cannot enjoin their removal. (Mass.) *Jennings v. Vahey*, 409.

2. **FIXTURES—Estate by Entireties.**—Boilers sold to a husband alone, under a contract retaining title in the vendor until paid for, and placed in, and permanently affixed to houses owned by such husband and wife in entirety do not become fixtures and may be replevied by the vendor if not paid for. (Mich.) *Schellenberg v. Detroit Heating etc. Co.*, 489.

3. **FIXTURES—Unity of Title.**—To constitute a fixture there must be annexation to the realty, together with unity of title and ownership of the realty and thing affixed. (Mich.) *Schellenberg v. Detroit Heating etc. Co.*, 489.

4. **FIXTURES—Intention.**—If a boiler is sold to a husband alone, the vendor retaining title until it is paid for, and is placed in a house owned by such husband and his wife by entireties, in such manner that it can be removed without injury to it or the building, this shows an intention that the boiler shall remain personalty and not become a fixture. (Mich.) *Schellenberg v. Detroit Heating etc. Co.*, 489.

FOREIGN LAWS.

See Evidence, 1.

FORFEITURES.

1. **FORFEITURES—Interpretation and Enforcement of.**—Forfeitures are not favored, and a contract, if ambiguous, will be so construed as to avoid them; but when it is clear that the parties have

agreed to a forfeiture, a court of law or of equity will enforce it. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

2. FORFEITURES—When not Relieved Against.—The Time of Payment specified in a contract may be material, and by its terms a failure to pay within that time may involve an absolute forfeiture; and if it does, the forfeiture will not be relieved against even in a court of equity. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

3. FORFEITURES AND LAPSES—Business Dependent on.—The mere facts that the success of a business or scheme is dependent, to some extent, upon lapses and forfeitures, even many lapses, is not sufficient to render it illegal. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

FRAUDULENT TRANSFERS.

See Constitutional Law, 3.

FRIGHT.

See Damages, 2.

FUNERAL EXPENSES.

See Executors and Administrators.

GAMBLING.

See Lotteries.

GARBAGE.

See Municipal Corporations.

GARNISHMENT.

1. GARNISHMENT—Reversal of Principal Judgment.—If the judgment against the principal debtor is reversed, a judgment against the garnishee will be set aside, although prior to a ruling on the motion therefor another judgment in favor of the plaintiff has been rendered on a recital of the principal case. (Iowa) *Decatur v. Simpson*, 328.

2. GARNISHMENT Against Foreign Corporation.—A judgment obtained in and by a citizen of one state, against a corporation organized in another state, but regularly doing business in the former state though its agents cannot be attached or garnished in such other state in an action by a corporation of that state against the judgment creditor who has not been personally served with process in such suit and who has not voluntarily appeared therein. (Minn.) *Boyle v. Musser-Sauntry Land etc. Co.*, 538.

See Corporations, 24; Partnership.

GIFT.

See Husband and Wife, 9, 10; Specific Performance, 4; Vendor and Vendee, 5.

GUARANTY.

See Husband and Wife, 4.

Note.

Guardian ad Litem. See Infants.

HABEAS CORPUS.

See Parent and Child, 2.

HIGHWAYS.

NEGLIGENCE—Presumption Arising from the Running Away of a Team.—When a team is found running away, unattended on a public highway, and doing damage to one lawfully thereon, negligence is *prima facie* imputable to the owner. (Tenn.) *Gorsuch v. Swan*, 836.

See Municipal Corporations, 9-11.

HOMESTEAD.

See Divorce.

HOMICIDE.

1. **MURDER by Abortion**—Evidence *Res Gestae*.—On a prosecution for murder resulting from an operation to produce an abortion, the declaration of the deceased, made at the time she was introduced to the accused, to the effect that she was pregnant, and which had direct reference to the contemplated transaction between the parties, is admissible in evidence as a part of the *res gestae*. (Idaho) *State v. Alcorn*, 252.

2. **MURDER by Abortion**.—An unnatural or criminal abortion procured upon a pregnant woman, is, when death results, murder in the second degree, and not manslaughter. (Idaho) *State v. Alcorn*, 252.

3. **MURDER by Abortion**.—On a prosecution for murder resulting from an operation to produce an abortion, the pregnancy of the deceased must be proved beyond a reasonable doubt, but need not be demonstrated to an absolute certainty. (Idaho) *State v. Alcorn*, 252.

4. **MURDER—Manslaughter**.—Under an indictment for murder a verdict of manslaughter may be sustained. (Idaho) *State v. Alcorn*, 252.

HORSES, RUNAWAY,

See Highways.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—Conveyance of Wife's Property—Joinder of Husband**.—The deed of a married woman conveying her separate property, containing the name of herself only as grantor, but reciting that she is "Sarah Peter, wife of Armenius Peter," while her husband joins her in signing and acknowledging such deed, and the granting clause, covenant of warranty, and testimonium clause thereof use the term in the plural "parties of the first part," is sufficient as his assent and joining with her under the statute, to convey her estate, especially when they surrender possession to their grantee who holds and enjoys it so long as the grantors live. (Mo.) *Peter v. Byrne*, 576.

2. **HUSBAND AND WIFE—Conveyance of Wife's Property—When Binding on Him**.—If a husband joins with his wife in signing

and acknowledging a deed purporting to convey her lands, he is bound by the premises therein contained, though his name may appear nowhere else in the deed. (Mo.) *Peter v. Byrne*, 576.

3. **MARRIED WOMAN—Laches of.**—If a married woman is authorized to act in respect to her separate estate as if unmarried, she is equally subject to the imputation and consequences of laches as if she were a *femme sole*. (W. Va.) *Phillips v. Piney Coal Co.*, 1040.

4. **MARRIED WOMAN'S Guaranty of Payment of Note.**—If a married woman assigns a note which is payable to her order, and guarantees its payment, she is liable on her guaranty, and the purchaser need not inquire as to her intended disposition of the proceeds of the sale. (Neb.) *Kitchen v. Chapin*, 637.

5. **MARRIED WOMEN—Contracts of.**—In Tennessee, the contracts of a married woman are voidable and will not be enforced against her, when there is a plea of coverture. (Tenn.) *First Nat. Bank of Geneva v. Shaw*, 840.

6. **MARRIED WOMEN—Contracts of Made in Another State—Law of the Forum, When Controls.**—A contract of a married woman made in Ohio, while she resides in Tennessee, and enforceable by the laws of the former, but not under the laws of the latter, will not support an action therein. The law of the forum controls. (Tenn.) *First Nat. Bank of Geneva v. Shaw*, 840.

7. **MARRIED WOMAN—Conveyance of Executed by Attorney in Fact.**—A power of attorney executed by a married woman authorizing the donee of the power to sell her separate real property is valid, and her conveyance executed under such power, in which her husband joins, transfers such property under a statute declaring that a husband and wife shall join in a conveyance of real estate, the separate property of the wife, and that no such conveyance shall take effect until acknowledged by her privily and apart from her husband before some officer authorized by law to take the acknowledgment of deeds. (Tex.) *Nolan v. Moore*, 911.

8. **MARRIED WOMAN—Estoppel to Assert Title.**—A married woman who is entitled to a conveyance of her real property by the owner of the legal title and procures him to convey it to another is not estopped from afterward asserting that such conveyance is void as against her rights. (Tex.) *Cauble v. Worsham*, 871.

9. **A MARRIED WOMAN Entering with Her Husband upon the Possession of Real Property under a Parol Gift and making valuable and permanent improvements acquires an equitable title thereto in her separate right.** (Tex.) *Cauble v. Worsham*, 871.

10. **MARRIED WOMAN—Conveyance of Her Equitable Title.**—If a married woman under a parol gift from an owner has the right to a conveyance of real property, her title cannot be divested by a conveyance made by such owner to a third person at her request. She can convey her equitable estate in the same manner only as that in which she can convey her legal estate, namely, by a conveyance executed by herself and husband, acknowledged in the manner prescribed by statute. (Tex.) *Cauble v. Worsham*, 871.

See Partnership, 1; Witnesses, 1-4.

Note.

Husband and Wife, joint deed by, what is, 584.

HYPOTHETICAL QUESTIONS.

See Evidence, 3.

INDICTMENT.

INDICTMENT—Waiver of Misnomer.—A plea of not guilty to an indictment is an admission that the name by which the accused is indicted is his true name and a waiver of the fact that it is a misnomer. (Ala.) *Verberg v. State*, 17.

INDORSEMENT.

See Bills and Notes; Non-negotiable Paper.

INFANTS.

INFANTS—Next Friend, Power of.—A next friend suing on behalf of an infant has no power to settle or compromise a judgment without the express sanction of the court. (W. Va.) *Fletcher v. Parker*, 991.

See Adoption.

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next friend of, power of, when commences, 996.

next friend of, process, power to waive services of, 1003.

next friend of, removal of by the court, 996.

next friend of, right of to bring suits without first procuring leave, 995.

next friend of, when deemed a trustee, 1003.

INNKEEPERS.

NEGLIGENCE of Saloon-keeper—Injury to Guest.—A saloon-keeper is bound to use reasonable care to protect his guests and patrons from injury at the hands of vicious or lawless persons whom he knowingly permits to be in or about his saloon. Hence, he is liable to a guest who, in his presence, is injured by the act of a third person in pouring alcohol on such guest while he is asleep, and then setting it on fire. (Minn.) *Curran v. Olson*, 517.

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Innkeepers, duty of to protect guests, 519.

INSANITY.

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INSTRUCTIONS.

See *Trial*, 4-8:

INSURANCE.

1. INSURANCE—Authority of Agent.—If a foreign insurance company has a general manager within the state authorized to appoint canvassers, such canvassers, while engaged in taking applications for insurance on blanks furnished by the insurer, are its agents, and their acts within the apparent scope of their authority, are binding upon it. (Minn.) *Otte v. Hartford Life Ins. Co.*, 532.

2. INSURANCE—Fraud of Agent—Effect on Insured—Warranty. If an application for insurance is made out by the authorized agent of the insurer, and the insured truthfully states the real facts, but such agent writes his answers incorrectly, and the insured signs the application in good faith and without knowledge of the agent's fraud, the insurer is bound by the policy issued and accepted by the insured although there is a provision in the application attached thereto that the statements of the insured therein shall be considered as warranties. In such case the warranties of the insured must be treated as having been waived by the insurer. (Minn.) *Otte v. Hartford Life Ins. Co.*, 532.

3. INSURANCE POLICY—Construction in Favor of Insured.—A policy of insurance susceptible of two constructions should be given the one most favorable to the insured. (Iowa) *Vorse v. Jersey Plate Glass Ins. Co.*, 330.

4. INSURANCE POLICY—Ordinary Meaning of Words.—The language of an insurance policy is to be given its ordinary and popular signification, rather than its technical meaning. (Iowa) *Vorse v. Jersey Plate Glass Ins. Co.*, 330.

5. INSURANCE.—The Breaking of Plate Glass from an Explosion of gas generated from gasoline used in the building is not due to the blowing up of the building, within the meaning of a policy exempting the insurer from any loss "caused by the blowing up of buildings." (Iowa) *Vorse v. Jersey Plate Glass Ins. Co.*, 330.

6. INSURANCE.—The Breaking of Plate Glass from an Explosion of gas ignited by a match is not caused by a fire, within the meaning of a policy exempting the insurer from loss "by or in consequence of any fire." (Iowa) *Vorse v. Jersey Plate Glass Ins. Co.*, 330.

7. INSURANCE—Suicide—Admissions of Assured.—The beneficiary in a life insurance policy, suing in her own right, is bound by the admissions of the assured, if a part of the *res gestae*, to the effect that he took his own life. (Iowa) *Sutcliffe v. Iowa State Traveling Men's Assn.*, 298.

8. ACCIDENT INSURANCE—Death from Disease and Accident. If an accident ruptures a kidney, and the resulting hemorrhage causes the death of the insured, the fact that a cancer in the organ is a predisposing cause of the hemorrhage does not prevent the death from being the result of an accident "independent of all other causes." (Mo.) *Fetter v. Fidelity etc. Co.*, 560.

9. ACCIDENT INSURANCE—Remote and Proximate Causes.—The "causes" referred to in a policy insuring against injuries sustained by accident "independent of all other causes," are the proximate or direct, not the remote, causes of death. (Mo.) *Fetter v. Fidelity etc. Co.*, 560.

10. ACCIDENT INSURANCE—Proof of Accident.—When, in an action on an accident insurance policy, the plaintiff introduces evidence tending to show that the insured died of hemorrhage resulting from an accidental fall, a *prima facie* case is made out, and it is not necessary to take up the defendant's side and prove that death did not result from the excepted causes named in the policy. (Mo.) *Fetter v. Fidelity etc. Co.*, 560.

11. INSURANCE Against Accident—Right of Examination.—Under a policy providing that any medical adviser of the company shall be allowed to examine the person or body of the injured in respect to an injury or cause of death, in such manner and at such times as he may require, the insurer has the right of examination and nothing more, and the authority of its agent is confined within the same limits. It confers no right to treat the injury, and the injured is not bound to submit to any course of treatment at the hands of any physician that the company may indicate. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

12. INSURANCE Against Accident—Relation Between the Insurer and the Medical Examiner.—If a policy of insurance stipulates that a medical adviser shall be allowed to examine the person or body of the injured in respect to the injury, the relation between the insurer and its medical adviser in making such examination is that of master and servant, and the principle of *respondeat superior* applies between them. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

13. INSURANCE Against Accident—Care to be Exercised in the Examination of an Assured.—Where a policy of insurance reserves to an insurer the right to the examination of the insured in respect to an injury, he is entitled to insist upon the use of care and skill in the exercise of the right of examination. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

14. INSURANCE Against Accident—Liability of Insurer for Negligence of Medical Examiner.—If the injury to the insured requires a plaster cast or similar appliance to hold injured ligaments in place until they are wholly well or regain strength, and the medical adviser of the insurer, in making an examination, removes and fails to replace such appliance, and injury results therefrom, he is guilty of negligence, for which his principal must answer in damages. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

See Constitutional Law, 5.

INTEREST.

See Usury.

Note.

Interstate Commerce, does not interfere with the power of the states to disregard contracts against public policy, 723, 734.

does not interfere with the power of the states to prescribe regulations, 723.

See Animals.

JOINT TENANCY.

JOINT TENANCY with Survivorship.—In Georgia the mere creation of an estate in two or more persons never draws to it survivorship as an incident, and the presumption is that survivorship is not intended; but if it is provided for by express terms or necessary implication, the law allows it to exist. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

JUDGES.

1. **THE JUDGES** of the Superior Courts of Record are Responsible Only to the people and the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. (Tenn.) *Webb v. Fisher*, 863.

2. **JUDGES, Civil Liability of.**—An action cannot be maintained against a judge of general jurisdiction for his acts in decreeing the disbarment of an attorney, though it is alleged that in so doing he acted oppressively, maliciously, and corruptly. (Tenn.) *Webb v. Fisher*, 863.

JUDGMENTS.

1. **NUNC PRO TUNC ORDER**—Evidence on Which to Enter.—In entering an order nunc pro tunc, the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed on any satisfactory evidence. (Neb.) *Harris v. Jennings*, 635.

2. **JUDGMENT Rendered Upon an Illegal Basis** cannot be sustained because one might have been rendered upon a legal basis. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

3. **JUDGMENTS, When Binding on Person not in Being.**—Contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance in the land and made a party to the suit. (S. C.) *Rutledge v. Fishburne*, 757.

4. **JUDGMENTS, When Binding on Persons not in Being.**—Executory devisees not yet in being are bound by a decree of foreclosure of mortgage on land, if the contingent remainderman having a vested interest therein is made a party to the suit. (S. C.) *Rutledge v. Fishburne*, 757.

5. **COLLATERAL ATTACK.**—When a Court Acquires Jurisdiction, it has the right to decide every question which arises in the case; and its judgment, however erroneous, cannot be collaterally assailed. Advantage of the errors can be taken only by proceedings in error or appeal to the supreme court. (Neb.) *Fraaman v. Fraaman*, 650.

6. VACATION OF JUDGMENT.—The Dishonesty of His Attorney, whereby a client is prevented from making a defense, and judgment by default is taken against him, is an "unavoidable casualty or misfortune" within the meaning of that term when used in a statute as a ground for the vacation of judgments. (Neb.) *Anthony & Co. v. Karbach*, 662.

7. VACATION OF JUDGMENTS.—The Verification of the Petition for the vacation of a judgment need not be in positive form. (Neb.) *Anthony & Co. v. Karbach*, 662.

8. VACATION OF JUDGMENT—Filing of Answer.—If an answer was tendered by the plaintiff with his petition for the vacation of a judgment, and was before the court so that its sufficiency could be determined, the fact that it was not formally filed is not material. (Neb.) *Anthony & Co. v. Karbach*, 662.

9. VACATION OF JUDGMENT—Special Findings.—A general finding, in proceedings to vacate a judgment, is sufficient to support an order of vacation, when no request for special findings has been made. (Neb.) *Anthony & Co. v. Karbach*, 662.

10. JUDGMENT—Effect of Dismissal of Writ of Error from.—A Dismissal by Agreement of a writ of error from a judgment does not bar or satisfy the judgment, though made on the suggestion that the matters in difference have been settled. It merely purges or releases the error, leaving the judgment to stand, and does not preclude the plaintiff from insisting that the judgment has not been paid. (W. Va.) *Fletcher v. Parker*, 991.

11. CONSTITUTIONAL LAW—Service by Publication.—The national constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, is applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and does not preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state to exercise authority over the person or the subject matter. Such constitutional provision does not apply to a judgment of the court of one state against a nonresident not personally served with process and who did not voluntarily appear therein. (Minn.) *Boyle v. Musser-Sauntry Land etc. Co.*, 538.

12. RES ADJUDICATA—Decree Allowing a Claim Against an Estate.—If a bill is brought to convene the creditors of a decedent, and states that a person named claims a debt against the decedent, which was not conceded by him, and such person appears in such proceeding and presents such claim, which is for maintaining and keeping in repair certain dams according to the terms of a written agreement, and evidence is taken to sustain and to repel the claim, and a decree results allowing it, this is conclusive upon the administrator and successor in interest of the decedent's title to the lands benefited by the agreement that the claimant had not committed any breach of it, and if such lands are subsequently sold to pay the debts of such decedent, the purchaser cannot maintain an action against such claimant for a breach of the agreement alleged to have occurred during the time for which the claim was allowed. (W. Va.) *Hurxthal v. Boom Co.*, 954.

13. RES JUDICATA—Time and Parties to Which Applies.—A decree establishing a claim against the estate of a decedent for acts claimed to be done in the performance of a covenant for the benefit of his land, while conclusive of such performance during his lifetime, is not conclusive that a breach of the covenant was not com-

mitted after his death, and does not prevent one who has acquired title to such land under a decree directing its sale for the payment of decedent's debts from maintaining an action for the breach of such covenant alleged to have been committed during the plaintiff's ownership. (W. Va.) *Hurxthal v. Boom Co.*, 954.

See Corporations, 25, 26; Garnishment; Municipal Corporations, 11; Parent and Child; Principal and Surety, 3-5; Writ of Error *Coram Nobis*.

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Judgments. See Corporations.

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JUDICIAL SALES.

JUDICIAL SALE.—Growing Crops do not Pass to the purchaser of the land at judicial sale so as to defeat the rights of one holding a chattel mortgage on them. (Neb.) *Aldrich v. Bank of Ohio*, 643.

See Executions; Mortgages, 7, 8.

JURISDICTION, CONTRACT LIMITING.

See Contracts, 12-14.

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Jurisdiction, contracts restricting to specified courts, 409.

Jury Trial, circumstantial evidence, instructions concerning, 791-801.

LABOR LAW.

See Constitutional Law, 7.

LACHES.

See Equity, 3; Husband and Wife, 8.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—Assignment of Lease—Collateral Security.—A covenant not to assign a lease without the consent of the landlord is not broken by an assignment of the lease as security for a debt. (Mich.) *Crouse v. Michell*, 479.

2. LEASE FOR YEARS—Assignment—Recording.—A lease for more than three years is a conveyance of such an interest in lands as to make real estate recording laws applicable to an assignment of such lease as security for a debt. (Mich.) *Crouse v. Michell*, 479.

3. LEASE—Assignments of—Priority.—As between two unrecorded assignments of the same lease, the one first executed has priority. (Mich.) *Crouse v. Michell*, 479.

4. AN ORDINARY OIL LEASE, under Which the Lessee is Required to Pay no Rent other than a share of the oil, and is given an absolute right to surrender it, is inchoate, contingent, and for the purpose of search only, until oil or gas is found. If the lessee gets no oil, he acquires no vested interest, and, on the other hand, if he gets oil, he acquires a vested estate. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

5. OIL LEASE—Estate, When Vests under.—When, under an ordinary oil lease, the lessee discovers oil, an estate vests in him. This result is not avoided by evidence tending to prove that the oil was not in paying quantity. Whether it is in such quantity is left to the judgment of the lessee. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

6. AN OIL LEASE may be Lost by Abandonment.—Abandonment may be the more readily found in the case of oil leases than in most other cases. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

7. OIL LEASE—Abandonment of, What Amounts to.—If a lessee of an oil lease bores wells in which oil is found in small quantities and in which pumps, though operated for months, produce not more than five barrels per day, no part of which is marketed, but all of which is allowed to run to waste, and all the appliances about the wells of any considerable value are removed, and wells bored in tracts some distance away produce gas only, and the field is what oil men call "wildcat territory," and all work ceases for more than a year, these facts establish the abandonment of the lease, and their force as such is not destroyed by the fact that there are no pipe lines in the immediate neighborhood by which the oil could be conducted to market. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

8. OIL LEASES—"Paying Quantities" Defined.—If an oil lease is for a term of years and as much longer as oil and gas can be produced in paying quantities, the term "paying quantities" means paying quantities to the lessee. If the oil pays a profit, however small, over operating expenses, it is produced in a paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase "paying quantities" is to be construed with reference to the operator and by his judgment when exercised in good faith. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

LAPSES.

See Forfeitures.

LARCENY.

1. LARCENY.—An Indictment for larceny charging that the accused "feloniously took and carried away" a certain sum of "money of the United States, the further description of which is to the grand jury unknown, the personal property of" a person

named, is sufficient and not open to demurrer. (Ala.) *Verberg v. State*, 17.

2. **LARCENY—Changing Money.**—If a person takes a piece of money from another to change and places it in his own pocket with the unlawful intent to convert it, or any part of it, to his own use, and refuses to deliver the money given him, or the change therefor, on demand, he is guilty of larceny, and the fact that the taking was open and from the owner is of no consequence, if the intent to steal existed. (Ala.) *Verberg v. State*, 17.

3. **LARCENY—Intent—Question for Jury.**—Under an indictment for larceny, the question of the intent with which the accused took the property is for the jury, although the taking was in the presence of the owners. (Ala.) *Verberg v. State*, 17.

LEASES.

See Landlord and Tenant.

LEGITIMATION.

See Bastards.

LIBEL AND SLANDER.

1. **LIBEL AND SLANDER—Special Damage, When not Required.**—If defamatory words falsely spoken of one prejudice him in business or occupation, they are actionable without proof of special damage. (Tenn.) *Cooley v. Galyon*, 823.

2. **LIBEL AND SLANDER—Words, When Actionable.**—To say of a contractor that, in completing a building, he will put in a grade of material inferior to that called for in the specifications is slanderous, and, if false, actionable. (Tenn.) *Cooley v. Gaylon*, 823.

3. **LIBEL AND SLANDER.—An Absolutely Privileged Communication** is one in respect to which, by reason of the occasion on which it is made, no remedy can be had in a civil action. (Tenn.) *Cooley v. Galyon*, 823.

4. **LIBEL AND SLANDER.—A Conditionally Privileged Communication** is one made on an occasion which furnishes a prima facie lawful excuse for the making of it, and is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse. (Tenn.) *Cooley v. Galyon*, 823.

5. **LIBEL AND SLANDER by a Witness in the Course of Judicial Proceedings.**—Though the words spoken by the defendant were false and malicious, they are privileged and are not actionable, if they were spoken by him as a witness in a judicial proceeding and were pertinent and relevant to the fact of inquiry therein or responsive to questions propounded by counsel while the defendant was being examined as a witness, though he was not a party to the action. (Tenn.) *Cooley v. Galyon*, 823.

6. **LIBEL AND SLANDER—Words Spoken by a Witness, When not Actionable Because Pertinent to an Inquiry in a Judicial Proceeding.**—If, in a judicial proceeding, a question arises and is put to a witness, whether A is a reliable contractor, and the witness responds that A has not paid some bills contracted last year, and that,

in completing a contract, he will put in a grade of material inferior to that called for in the specifications, this answer, though false and actuated by malice, is absolutely privileged, and no action can be sustained against the witness therefor. (Tenn.) *Cooley v. Galyon*, 823.

7. LIBEL AND SLANDER—Pleadings.—The defense that the words claimed to be slanderous were spoken by a witness in the course of a judicial proceeding may be received in evidence, either under a special plea or the general issue. (Tenn.) *Cooley v. Galyon*, 823.

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Libel, privileged communications, statements made by a party in his pleadings, 832.

privileged communications, statements made by a witness in a judicial proceeding, 835.

privileged communications, statements made in judicial proceedings regarding third persons, 835, 836.

LIEN FOR FREIGHT.

See *Trover and Conversion*, 7.

LIMITATION OF ACTIONS.

1. LIMITATIONS, Statute of—Bar of, When Prevented by Suit to Dismiss for Want of Prosecution.—Under a statute providing that if any action commenced within due time should be arrested or reversed on a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the cause having been dismissed for want of security for costs, or by reason of any cause which could not be applied in bar of the action, then, notwithstanding the expiration of the time within which a new suit or action may otherwise be brought, the same may be brought within one year after the dismissal of the other cause, or after the arrest or reversal of the judgment, the fact that the first cause was commenced in a court of the United States, where it was dismissed for want of jurisdiction, does not deprive the plaintiff of the benefit of the statute or of the right to bring a new action within a year after such dismissal. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

2. LIMITATIONS, Statute of.—When some prerequisite to the bringing of a suit rests with the claimant, he cannot defeat the operation of the statute of limitations by long and unnecessary delay in taking the antecedent step, and the statute commences to run within a reasonable time after he could, by his own act, perfect his right, which reasonable time in no event extends beyond the statutory time for the bringing of the suit. (Kan.) *West v. Topeka Savings Bank*, 385.

See *Adverse Possession*; *Corporations*, 16-18; *Quieting Title*; *Tenancy in Common*.

LOTTERY.

1. LOTTERY.—The Three Essential Ingredients of a lottery are consideration, prize, and chance; chance alone, or coupled with consideration, will not make a lottery. (Ga.) *Equitable Loan etc. Co. v. Waring*, 177.

2. LOTTERY—Multiple Table.—Where Certificates of Investment are issued by a company, the fact that those to be called for redemption are determined by reference to a table of numbers arranged according to multiples of the figure 3, instead of in their numerical order, thereby making it possible in some cases for certificates to be redeemed before others of older date, does not make the scheme a lottery. (Ga.) Equitable Loan etc. Co. v. Waring, 177.

3. LOTTERY—Chance and Prize.—When a Number of Persons are entitled in any event each to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot, or chance, or drawing of what portion of that number shall be paid at different times, does not give to the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by lot, drawing, or chance, that the elements of a lottery are present. (Ga.) Equitable Loan etc. Co. v. Waring, 177.

4. LOTTERY—Investment Certificates—Absence of Prize.—A scheme for the issuance and redemption of investment certificates or bonds, which involves the elements of consideration and chance, but not the element of prize, is not a lottery. (Ga.) Equitable Loan etc. Co. v. Waring, 177.

MANSLAUGHTER.

See Homicide.

MARRIED WOMEN.

See Husband and Wife.

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conveyance by, joinder of husband in, what sufficient, 584-587.

MASTER AND SERVANT.

1. MASTER AND SERVANT—Contract to Increase Salary.—If a contract of employment is made at a stipulated monthly salary for one year, an agreement during the term to pay more, unsupported by any change in the hours, character of the work, or other consideration, is void. (Ga.) Davis & Co. v. Morgan, 171.

2. MASTER AND SERVANT—Dangerous Premises—Hole Dug by Licensee.—If a gas company permits third persons to take cinders from the end of a dump which has been built up by cinders carried in cars along a track from the works, and one of these persons, just before dark and without being seen, instead of filling his wagon from the end, takes a load at a point farther back on the dump, making a hole under the track, the company is not liable to one of its employes who, in running a cinder-car, about an hour later, falls

into the excavation. (Mo.) *Chandler v. Kansas City Missouri Gas Co.*, 570.

3. MASTER AND SERVANT—Duty of Obedience.—It is not true that employes of a railway corporation are bound under all circumstances to obey the orders of their superiors. Obedience to an order may involve personal risk so great and obvious that no prudent man should take it. A master or his representative has no right to give, nor is the servant bound to obey, such an order. (Tex.) *Houston etc. Ry. Co. v. De Walt*, 877.

4. A MASTER ORDERING HIS SERVANT to do Extrahazardous Work is not necessarily answerable to the servant for injuries received from his obedience. If the work involves risk so great and obvious that no prudent man should undertake it, a servant who takes the risk of doing it will not be heard to complain in the courts. (Tex.) *Houston etc. Ry. Co. v. De Walt*, 877.

5. MASTER AND SERVANT—Promise to Repair, When not Imputable to the Master.—A remark made by the engineer to a brakeman, on discovering a defect in the step of a locomotive, "I'll have it fixed," does not amount to a promise by the master to repair, where the engineer has no power to employ or discharge brakemen or other servants. (Tex.) *Gulf etc. Ry. Co. v. Garren*, 939.

6. MASTER AND SERVANT—Recovery by Servant for Injuries Received from Defects of Which He had had Knowledge.—Although a servant may at one time have known of the existence of a defect, he may not know of it at the time of undertaking to use an appliance. Circumstances may justify him in believing that defective conditions have been remedied, and he may recover for injuries received from the use of the defective appliance, if he believes it had been repaired, and the circumstances justify the belief. (Tex.) *Gulf etc. Ry. Co. v. Garren*, 939.

See Constitutional Law, 7.

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Master and Servant, age and experience of servant, when affect the risks assumed, 888.

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MEANDER LINES.

See Boundaries.

MECHANICS' LIENS.

MECHANICS' LIENS.—A Public Library Building, erected by a town for a free public library, is not subject to a mechanic's lien. (Mass.) *Young v. Falmouth*, 418.

MISNOMER.

See Indictment.

MONOPOLY.

See Municipal Corporations.

MORTGAGES.

1. MORTGAGES—Release—Discharge—Notice.—A mortgagee by releasing several parcels of land from his mortgage does not discharge therefrom another parcel sold by the mortgagor prior to such release when he has no notice of the sale or that the purchaser thereunder is claiming rights sufficient to put a reasonably prudent man on notice, and the record of such purchaser's deed is not sufficient as constructive notice to such mortgagee. (Mich.) *Balen v. Lewis*, 499.

2. MORTGAGES—Subsequent Purchase from Mortgagor—Notice. The presence of the mortgagee's agent in the place where the mortgaged premises are located once or twice a year after a purchaser from the mortgagor, has gone into possession of such premises, is not sufficient to charge the mortgagee with notice of the purchaser's occupancy. (Mich.) *Balen v. Lewis*, 499.

3. MORTGAGES—Application of Rents—Presumption.—If a mortgagor gives a trust deed to the mortgagee's husband for the benefit of the former, authorizing him to sell, apply the proceeds to the expenses of the trust, interest and principal, and reconvey the remainder to the mortgagor, and such trust is accepted upon express agreement that it shall not in any way affect or impair the mortgage, it must be presumed that rents and proceeds of the property thereafter collected by the mortgagor were applied in accordance with the trust. (Mich.) *Balen v. Lewis*, 499.

4. MORTGAGES—Record as Notice.—The record of a mortgage executed in the name of A. W. Dixon, is not notice to purchasers for value that J. W. Dixon executed it. (Ala.) *Johnson v. Wilson*, 52.

5. MORTGAGE—Title and Possession of Mortgagee.—A provision in a mortgage that the mortgagee, upon default, shall be entitled to the immediate possession of the premises is valid, and subsequent purchasers and encumbrancers are chargeable with notice thereof. (Neb.) *Felino v. Newcomb Lumber Co.*, 646.

6. MORTGAGEE in Possession—Rents and Profits.—A subsequent purchaser or encumbrancer cannot maintain an action for the rents and profits against a mortgagee who has taken possession of the premises in accordance with the terms of the mortgage; while he will be required to account for the rents and profits, such account should be taken in the suit to foreclose or redeem. (Neb.) *Felino v. Newcomb Lumber Co.*, 646.

7. MORTGAGE FORECLOSURE Concludes Rights to Rents and Profits.—The foreclosure of a mortgage, by the terms of which the mortgagee, upon default, took possession of the premises, concludes the parties to the proceedings as to the rents and profits. (Neb.) *Felino v. Newcomb Lumber Co.*, 646.

8. FORECLOSURE SALES.—Inadequacy of Price, in the absence of other considerations, is no ground for setting aside a foreclosure sale under a deed of trust, unless it is so gross and unconscionable as to shock the moral sense. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

See Chattel Mortgages.

Note.

Mortgages, foreclosure of as against persons not in being, 767.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—Garbage Ordinance.—In the exercise of its police power, a city may make needful regulations

for the collection and removal of garbage, and for the licensing of those who engage in the business. (Neb.) *Iler v. Ross*, 676.

2. **MUNICIPAL CORPORATIONS—Garbage, Exclusive Privilege to Remove.**—A city may grant an exclusive privilege to one person to collect and remove such noxious and unwholesome substances as are nuisances in themselves, and a menace to the public health if not promptly and properly disposed of. (Neb.) *Iler v. Ross*, 676.

3. **MUNICIPAL CORPORATIONS—Garbage, Exclusive Privilege to Remove.**—A city cannot grant an exclusive privilege to one person to enter private premises and gather and remove, at the owner's expense, rubbish and waste material which, unless allowed to accumulate in unreasonable quantities, are not per se nuisances. (Neb.) *Iler v. Ross*, 676.

4. **MUNICIPAL CORPORATIONS—Void Contract.**—A contract entered into by the common council of a municipality concerning a municipal matter for the benefit of one of the members of such council is void. (Minn.) *Stone v. Bevans*, 506.

5. **MUNICIPAL CORPORATIONS—Contract of Officer with Recovery of Payments.**—If a void contract is entered into between a municipal council and one of its members under which the latter has received money, it may be recovered for the municipality in a suit by a taxpayer thereof. (Minn.) *Stone v. Bevans*, 506.

6. **TRUST, Capacity of City to Hold Property in.**—Municipal corporations may take and hold property in their own right by direct gift, conveyance or devise, in trust, for purposes germane to the objects of the corporation, or which will aid in carrying out those objects. (Colo.) *Clayton v. Hallett*, 117.

7. **MUNICIPAL CORPORATION—Negligence of Employee.**—If a city, in the exercise of its police power, employs a person to cut the weeds and grass in an alley, it is not answerable for his negligence in operating the mower whereby a child is injured. (Iowa) *McFadden v. Town of Jewell*, 321.

8. **MUNICIPAL CORPORATIONS — Negligence — Dangerous Streets.**—If a city negligently allows a public street to remain in a dangerous condition, it must respond in damages to a property owner who ventures thereon in search of recreation or when called to do so by duty, and is injured through such danger while exercising ordinary care. (Pa. St.) *Evans v. Philadelphia*, 732.

9. **MUNICIPAL CORPORATIONS, Public Highways of, Power of the Legislature to Control.**—It is the duty of the state to lay out and improve highways of travel. The performance of this duty in cities rests on the state with the same obligation as in unincorporated country districts, and the legislature may control the work necessary in the performance of this public duty, whatsoever the agency employed in carrying it out. (Kan.) *State v. Atkin*, 343.

10. **PUBLIC STREETS.—The Owner of Property Abutting on a public street has a right to an interest in the street distinct and different from that of the general public.** (Iowa) *Long v. Wilson*, 315.

11. **JUDGMENT Against City—Whether Binds Citizen.**—An owner of property abutting on a public street is not bound by a judgment against the city fixing the boundaries of the street so as to interfere with the use of his property, when he was not made a party to the suit. (Iowa) *Long v. Wilson*, 315.

See Constitutional Law, 7.

Note.

- Municipal Corporations**, dead animals, power to give authority to appropriate carcasses of, 691.
 dead animals, power to limit right to remove, 691.
 dead animals, property in cannot be destroyed by, 691.
 exclusive privilege of removing garbage, whether may be granted by, 688, 689.
 garbage, power of to limit right of removal of to certain persons, 688.
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 monopolies in the removal of garbage, power of to create, 689.
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 scavengers, power of to restrict business of to certain persons, 688.
 work upon streets of, power of the legislature to control the hours of, 350.

MURDER.

See Homicide.

NEGLIGENCE.

1. **NEGLIGENCE**.—Degrees of Negligence, such as slight, ordinary, and gross, are not recognized in Colorado. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.
2. **NEGLIGENCE** Must be the Proximate Cause of an Injury to sustain a recovery therefor. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.
3. **NEGLIGENCE**—Proximate Cause—Injuries Received in Attempting a Rescue.—Where one person is exposed to peril of life or limb by the negligence of another, the latter is liable for injuries received by a third person in a reasonable effort to rescue the person so imperiled, if the rescuer does not rashly or unnecessarily expose himself to danger. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.
4. **NEGLIGENCE**.—The Proximate Cause of an Injury is that act or omission which immediately causes or fails to prevent the injury; an act of omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted. (Conn.) *Chattanooga Light etc. Co. v. Hodges*, 844.
5. **NEGLIGENCE**—Proximate Cause.—A wrongdoer is liable not only for an injury which immediately results from his act, but for such consequential injuries as, according to the common experience of man, were likely to result. It will be sufficient to fix liability on a wrongdoer if the particular result is one naturally connected, either immediately or through a series of events, with the original wrongful act. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.
6. **NEGLIGENCE**—Proximate Cause, What is not.—Where a result is such that no reasonable man would expect it to occur, and no knowledge is shown in the person doing the negligent or wrongful act that such state of facts exists as to make the danger probable, the injury will not be regarded as actionable as against the wrongdoer. Especially is this true where the injury results from an act committed by the injured party, so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.

7. NEGLIGENCE—Proximate Cause—Interfering Act of the Plaintiff.—The plaintiff's interfering act, rather than the defendant's negligence, may be regarded as the proximate cause of the former's injury, whether he was guilty of contributory negligence or not, if it was unexpected and of a character which could not have been contemplated or foreseen and without which no injury would have occurred. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.

8. NEGLIGENCE—Proximate or Intervening Cause, When a Question for the Court.—Where the facts are fairly inferable, the question of proximate or intervening cause is for the court. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.

9. NEGLIGENCE—Proximate or Intervening Cause—Rash Exposure to Injury.—If one has been guilty of an act of negligence exposing his property to destruction by fire, and his employé, disregarding the espostulation of a third person characterizing his conduct as foolhardiness, leaves a place of safety and goes through fire and smoke to his mortal injury, this rashness, rather than the original negligence, is the proximate cause of his injury. Hence, no recovery therefor can be sustained against the employer. (Tenn.) *Chattanooga Light etc. Co. v. Hodges*, 844.

10. NEGLIGENCE, Contributory as a Bar to Actions of Contract. In an action to recover damages for the breach of a contract, the contributory negligence of the plaintiff ordinarily does not preclude his recovery, as would be in the case of an action of tort. Such negligence rarely releases the defendant from the obligation to perform his contract, but is always to be considered in fixing the amount of the damages, i. e., so much of the damage as is attributable to the plaintiff's negligence should be excluded from the recovery. (W. Va.) *Hurxthal v. Boom Co.*, 954.

11. NEGLIGENCE—Pleading.—A complaint, though not in terms characterizing the failure to perform a plain duty as negligence on the part of the defendant, yet averring facts which constitute negligence per se, is sufficient as against demurrer. (Ala.) *Southern Bell Telephone etc. Co. v. McTyer*, 62.

12. NEGLIGENCE—Evidence—Instructions.—If, in an action to recover for negligence, the evidence tends to prove the injury complained of and the casual connection between the wrong complained of and the injury sustained, a general affirmative charge in favor of the plaintiff is properly given, and a general affirmative charge in favor of the defendant is properly refused. (Ala.) *Southern Bell Telephone etc. Co. v. McTyer*, 62.

See Damages; Death; Highways.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Failure to File Motion for in Time.—A motion for a new trial must be filed within the time prescribed by statute, and if it is overruled because not filed within that time, all matters included therein are unavailing on review by proceedings in error. (Neb.) *Harris v. Jennings*, 635.

NEXT FRIEND.

See Infants.

Note.

Non-negotiable Instruments, assignee of, diligence which must be used by, 989.

assignment of, warranties implied by, 986.

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indorsement of by a payee, effect of, 988.

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indorsement of in blank by a stranger, liability created by, 988.

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indorsement of in blank, what may be written over by the holder, 987.

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indorsement of, qualified liability held to result from, 986, 987.

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laches of assignee, when precludes his maintaining an action against the assignor, 990.

liability of person writing his name on the back of, 985, 986.

statutes of limitation in suits against assignors or indorsers of, 990.

NUISANCE.

1. NUISANCE, Public—Right of Private Citizen to Abate.—A private individual who alleges upon sufficient facts, that he has suffered a special injury from a public nuisance which is real and distinct from that suffered by him in common with the public at large, and is so continuous in its nature that the legal remedy for damages is inadequate, is entitled to maintain suit to abate such nuisance. (Ala.) *Roberts v. Mathews*, 56.

2. NUISANCE, Public—Abatement by Private Individual—Remedy at Law.—Although an obstruction constitutes a public nuisance causing actionable injury to a private citizen, yet if such obstruction is permanent, and the defendant is not insolvent, and a single action at law for damages will furnish a full remedy for such injury, a resort to equity by the injured party for the mere purpose of abating such nuisance is unwarranted. (Ala.) *Dennis v. Mobile etc. Ry. Co.*, 69.

3. NUISANCE, Public—Abatement by Private Individual.—The jurisdiction of equity to restrain a public nuisance at the suit of a private individual is exercised only when he has a legal right and is without other adequate remedy at law for its enforcement. Hence a bill filed by a private individual for such purpose must not only show that the complainant will sustain injury distinct from that which he will suffer in common with others, such as would furnish the basis for an action at law, but it must go further, and show that the injury from the nuisance will be irreparable, or will be such that complete compensation therefor cannot be obtained in a single action at law. (Ala.) *Dennis v. Mobile etc. Ry. Co.*, 69.

4. NUISANCE, Public—Abatement by Private Individual.—In an action by a private individual to abate a public nuisance, the injury will be considered irreparable so as to entitle him to relief

when the resulting damage will be incapable of being measured by a pecuniary standard, and when, without assistance in equity, the injured party must suffer invasion of his substantial rights without compensation, or when if reparation were sought in the law court, the remedy would involve a multiplicity of suits by the same plaintiff. (Ala.) *Dennis v. Mobile etc. Ry. Co.*, 69.

5. NUISANCE, Public—Abatement by Private Citizen—Pleading.—An averment by a private individual seeking to abate a public nuisance, of a mere conclusion as to inadequacy of legal remedy, or as to the irreparable character of the injury, without an averment of facts to support the conclusion is insufficient. (Ala.) *Dennis v. Mobile etc. Ry. Co.*, 69.

See Dedication, 2.

Note.

Nuisance, bees, keeping of, whether may be declared to be a, 291.

NUNC PRO TUNC.

See Judgments, 1.

OFFICERS.

PUBLIC OFFICERS—Agreement Disposing of Salary.—An agreement by a public officer that his salary when earned shall become assets of a partnership of which he is a member is not against public policy as an assignment of an unearned salary by a public officer. (Mich.) *McGregor v. McGregor*, 492.

See Judges.

OIL LEASE.

See Landlord and Tenant.

PARENT AND CHILD.

1. PARENT AND CHILD—Foreign Decree of Divorce Affecting the Custody of a Child.—A decree of divorce in another state or territory in which the custody of the child is awarded to the father is conclusive as to his right and fitness for such custody at that time, and in a proceeding by habeas corpus for the possession of the child evidence will not be heard to show that he was less fit for such custody than the mother at the time of the entry of the decree. It is not, however, a bar to a subsequent proceeding to modify it upon proof that the situation and character of the parties have so changed as to render it to the interest of the child that it be committed to the care of its mother. (Tex.) *Wilson v. Elliott*, 928.

2. HABEAS CORPUS—Custody of Children—Res Judicata.—Notwithstanding the determination in a previous proceeding by habeas corpus of the right to the custody of a child, another court may make a different order respecting such custody, if satisfied that the interests of such child so require, though no material change in the circumstances is shown. (Kan.) *In re King*, 399.

3. CHILDREN.—The Domicile of a Child is not within this state if its father has at all times been a citizen and resident of a foreign country, and has never been within the state, though the child was born within, and has never been beyond, the state. (Mass.) *Stearns v. Allen*, 441.

See Adoption; Bastards.

Note.

Parties, chancery rules concerning, 762.

not before the court, when may be bound by the decree, 762.

not in being, when bound by the judgment or decree, 762-768.

PARTITION.

PARTITION of Building and Lots by Sale.—If parties own land jointly and the building thereon severally, a partition of the property by sale may be decreed. (Iowa) Truth Lodge No. 213 etc. v. Barton, 303.

Note.

Partition, effect of judgments in as against persons not in being, 764, 766.

PARTNERSHIP.

1. PARTNERSHIP.—A Husband and Wife may be Partners under the statutes of Iowa extending the powers of married women in respect to the making of contracts and the ownership and disposition of separate property. (Iowa) Hoaglin v. Henderson & Co., 335.

2. PARTNERSHIP FUNDS—Application to Individual Debt.—Where a partner, without disclosing the fact of partnership, purchases goods for the firm, the vendor cannot apply the money paid in advance to the satisfaction of a debt owing from the partner individually. (Iowa) Hoaglin v. Henderson & Co., 335.

3. PARTNERSHIP—Setoff Against.—In an Action by a partnership to recover a partnership claim, the debtor cannot set off a claim which he holds against an individual member of the firm. (Iowa) Hoaglin v. Henderson & Co., 335.

4. PARTNERSHIP—Garnishment of Individual Interest.—A partner's individual interest in a debt due the firm cannot be reached by garnishment in a court having no power to acquire jurisdiction of the partnership or determine the interest of each partner. (Iowa) Hoaglin v. Henderson & Co., 335.

5. PARTNERSHIP—Release of the Firm Without Affecting the Liability of Its Members as Indorsers.—Where a negotiable note is executed by a partnership and indorsed by its members and others, an agreement not to sue the maker, but reserving all rights against the indorsers releases the firm as maker, but not the individual members as indorsers. (Mass.) Faneuil Hall Nat. Bank v. Meloon, 416.

PASSENGERS.

See Carriers.

PATENTS.

See Public Lands.

PHYSICIANS AND SURGEONS.

1. PRACTICE OF MEDICINE—Christian Science.—A charter to establish and maintain a place of public worship and to preach the gospel as found in the Bible and a certain Christian Science textbook, and to train persons for the treatment of disease simply and

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solely by inaudible prayer in the presence of the sick or at a distance, as taught by such text-book, founded on the theory alone that all disease of every nature is a mere belief and not a real fact, and not requiring such persons to have any knowledge of anatomy, physiology, pathology, or hygiene, must be refused on the ground, that such system of healing disease is opposed to the general policy of the law, as to the existence, treatment and cure of sickness and disease. (Pa. St.) First Church of Christ, Scientist, 753.

2. PRACTICE OF MEDICINE—Christian Science.—A charter to enable an association of persons to treat disease solely by Christian Science, which embraces the theory that disease of every nature can be cured by prayer alone, must be refused on the ground that it is opposed to the general policy of the law regarding the existence, treatment, and cure of disease, and to statutes regulating the qualifications of those who shall be allowed to attempt to cure or heal disease. (Pa. St.) First Church of Christ, Scientist, 753.

See Insurance, 12-14; Witnesses, 2.

PLEADING.

1. PLEADING—New Cause of Action in the Reply.—An objection that cause of action is first stated in the reply is waived, if not raised in the trial court, and the issues are presented and submitted on their merits. (Neb.) Farmers' etc. Ins. Co. v. Dabney, 624.

2. PLEADING INCONSISTENT DEFENSES.—The defendant has the right to plead inconsistent defenses. If in one part of his answer he denies a fact and in another part alleges its existence, the answer cannot be taken as an admission of such fact. (Tex.) Houston etc. Ry. Co. v. De Walt, 877.

3. PLEADING—Conclusions, Effect of Admitting by Demurrer.—An allegation that certain drafts or bills of lading were indorsed in blank and were transferred to a purchaser by a defendant banking company, whereby it became the owner of such drafts and bills of lading and the cotton represented thereby, and undertook and promised to carry out the contract made between plaintiff and the shipper, states a mere conclusion of the pleader, and a demurrer to the complaint does not admit that the transaction was other than an ordinary purchase of a draft accompanied by a bill of lading. (Tex.) S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank etc., 944.

See Equity.

Note.

Pleading, demurrer to complaint, what admitted by, 833.

PLEDGE.

COLLATERAL SECURITY—Failure to Present for Payment and Give Notice of Dishonor.—Though the holder of a negotiable instrument taken as collateral security for a debt fails to present it for payment when due or to give notice of dishonor, this does not entitle the pledgor to treat it as a payment for its face value. (Mass.) Coleman v. Lewis, 450.

See Landlord and Tenant, 1.

POLICE POWER.

See Constitutional Law, 2.

POWER OF ATTORNEY.

See Husband and Wife, 7.

POWER OF SALE.

1. **POWERS OF SALE—Special, How Must be Pursued.**—Where a special power of sale is given, to be exercised only on the happening of a certain event, it can be executed only in the mode, at the time, and upon the conditions prescribed in the instrument creating it, and the purchaser must, at his peril, ascertain whether the contingency upon which the sale is authorized existed. This rule applies only where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, which may be ascertained by anyone with equal certainty. (Tenn.) *Matthews v. Capshaw*, 854.

2. **POWERS OF SALE.**—Where the condition upon which a power of sale is to be exercised is such that the determination, whether it has been fulfilled or not, requires the exercise of judgment and discretion, as to which there may be an honest difference of opinion, the decision of the donee of the power, in good faith and without notice to an innocent purchaser, will not be set aside, though it may afterward appear that his judgment was erroneous. (Tenn.) *Matthews v. Capshaw*, 854.

3. **IF A POWER of Sale is to be Exercised if a Necessity for so Doing Arises**, the judgment of the donee of the power as to the necessity is conclusive in the absence of fraud. (Tenn.) *Matthews v. Capshaw*, 854.

4. **POWER OF SALE.**—Though a Power of Sale is not Exercised in Good Faith, the title of the purchaser is not thereby affected, unless collusion or guilty knowledge can be traced to him. (Tenn.) *Matthews v. Capshaw*, 854.

5. **POWERS OF SALES Given in Wills Should Receive a Liberal Construction** in order to carry out the purpose and intent of the testator. (Tenn.) *Matthews v. Capshaw*, 854.

6. **POWER OF SALE—Conveyance, When Deemed to be in Execution of.**—Where the owner of a life estate is vested with a power of sale and executes a conveyance purporting to convey in fee, but without referring to the power, its exercise will nevertheless be presumed. No express recital of the power is required. (Tenn.) *Matthews v. Capshaw*, 854.

PRACTICE OF MEDICINE.

See Physicians and Surgeons.

PRINCIPAL AND AGENT.

1. **AGENCY—Fraud of Agent—Duty to Disclose Facts.**—An agent authorized by his principal to sell property on certain terms and for a specified price, who learns before sale is made that other and more advantageous terms and prices can be obtained, is bound to communicate such facts to his principal before making the sale, and his failure to do so is a fraud for which the principal is entitled to recover of him whatever loss he actually suffers through such failure. (Minn.) *Holmes v. Cathcart*, 513.

2. AGENCY FOR COLLECTION.—A mere collecting agent can relinquish no right of his principal, nor recognize any adverse claim so as to bind him without express authority. (Ala.) *Johnson v. Wilson*, 52.

3. AGENCY—Estoppel to Deny.—A purchaser of a note who permits the payee named therein to collect the principal and interest thereon, without notifying the maker of the note of his ownership, is estopped to deny the agency of the named payee to collect the money due on the note. (Idaho) *Morgan v. Neal*, 264.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—Duty to Defend Actions or to Represent His Cosurety.—A contract of suretyship imposes no duty upon the sureties to defend their principal, gives the principal no right to represent the sureties, and gives no surety any authority to charge his fellows by virtue of his knowledge or his conduct. (Kan.) *Park v. Ensign*, 352.

2. PRINCIPAL AND SURETY—Waiver of Defenses by.—The refusal of sureties, in an action against them and their principal, to litigate a question of damages for which they are not answerable, cannot preclude them, when sued, from asserting any defenses which would have been available in favor of their principal, including a claim for damages on his part against the plaintiff in the action. (Kan.) *Park v. Ensign*, 352.

3. A JUDGMENT Against a Principal on a Promissory Note is not Prima Facie Evidence Against His Surety. (Kan.) *Park v. Ensign*, 352.

4. JUDGMENT, Attorney not Bound by When not a Formal Party.—A judgment in an action against a principal is not binding on his sureties or either of them, though one of them, as an attorney for the principal, conducted the defense of the action. (Kan.) *Park v. Ensign*, 352.

5. A JUDGMENT Against a Principal does not Estop His Sureties.—Except in those cases where, upon a fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of an action, a judgment against a principal is not conclusive against his surety. (Kan.) *Park v. Ensign*, 352.

See Attachment, 5, 6; Husband and Wife, 4.

PROBATE PROCEEDINGS.

See Executors and Administrators.

Note.

Probate Proceedings, decrees of, effect of as against persons not in being, 767.

PROCESS.

See Corporations, 21-24; Judgments.

PROPERTY.

1. PROPERTY in Compiled Information and Reports.—One who collects information in regard to the contemplated erection of public and private buildings and the construction of sewers, waterworks, and other undertakings of public utility as soon after their contem-

plation as possible, and compiles and distributes such information daily to his customers under contracts with them, so that it is of commercial value by reason of the speedy use which can be made of it before the information contained therein has obtained general publicity, has a property interest in such information in which he is entitled to the protection of a court of equity. (Mass.) *F. W. Dodge Co. v. Construction Information Co.*, 412.

2. REPORTS AND INFORMATION—Publication of, What is not. The furnishing of reports and information to customers under a contract with them that they shall hold the information in strict confidence and for their purposes only, is not a publication thereof, so as to dedicate the reports or information to the public, and deprive their compiler and furnisher of his right of control. (Mass.) *F. W. Dodge Co. v. Construction Information Co.*, 412.

3. REPORTS AND INFORMATION—Enjoining the Surreptitious Obtaining and Using of.—Where information is obtained and compiled by the expenditure of labor and money, and, in the form of reports, is distributed to customers for a compensation, under a contract by which they agree not to divulge such reports or information, a third person may be enjoined from obtaining such reports or information from one of such customers, contrary to such stipulation, and using it for the purpose of conducting a rival business. (Mass.) *F. W. Dodge Co. v. Construction Information Co.*, 412.

PROXIMATE CAUSE.

See Negligence.

PUBLIC LANDS.

1. LAND PATENT—Cancellation for Fraud.—A patent to land should not be set aside for fraud in procuring it except upon the most convincing evidence. (Iowa) *Murray v. Quigley*, 276.

2. LAND PATENT—Fraud, Knowledge of Presumed.—Persons alleging fraud in the issuance of a patent are conclusively presumed to have discovered it at the time the patent was recorded, if they have lived for years in the vicinity of the land, with knowledge of the possession of the patentee, and at least some of them with actual knowledge of his claims, and the character of his title has been a frequent subject of discussion among those interested therein. (Iowa) *Murray v. Quigley*, 276.

3. SWAMP LAND.—The Determination of Whether Land is swamp, must, in the first instance, be by the federal government; and, until such determination is made, a grantee has only an inchoate right, not amounting to a title. (Iowa) *Carr v. Moore*, 292.

PUBLIC OFFICERS.

See Officers.

PUBLICATION OF REPORTS.

See Property.

QUARANTINE.

See Animals.

QUIETING TITLE.

1. QUIETING TITLE—Limitation of Action in Case of Fraud.—Parties cannot, by naming their petition an action to quiet title, have a conveyance annulled for fraud, when its fraudulent character has been known to them for thirty years. (Iowa) *Murray v. Quigley*, 276.

2. QUIETING TITLE by Remainderman—Limitations.—Remaindermen out of possession, and while the life tenant is alive, are authorized by the Iowa statutes to bring an action to determine and quiet their title, but they must do so within the statutory period. (Iowa) *Murray v. Quigley*, 276.

RAILROADS.

1. RAILWAYS.—Though a Person is Stealing a Ride on a railway train, and is therefore a trespasser, neither the carrier nor its servant has any right to inflict wanton and reckless injury upon him. (Mass.) *McKeon v. New York etc. R. R. Co.*, 437.

2. RAILWAY—Proximate Cause.—If One Stealing a Ride on a Railway Train is Pushed Therefrom by an employé of the carrier, and thereby injured, the act of the employé, rather than the stealing of the ride, is the proximate cause of the injury. (Mass.) *McKeon v. New York etc. R. R. Co.*, 437.

See Carriers.

RECEIVERS.

1. RECEIVERS OF CORPORATIONS.—It is no Ground for Appointment of a receiver of a corporation that the directors in office are holding over after the year for which they were elected in default of the election of their successors. The cause of such default is of no consequence. (Ala.) *Alabama Coal etc. Co. v. Shackelford*, 23.

2. RECEIVERS—Corporations.—It is No Ground for the appointment of a receiver of a corporation that its directors have paid to the estate of a deceased kinsman director money of the corporation without authority, or that they have voted to themselves salaries as officers of the corporation in abuse of their trust, or that they have fraudulently sold the corporate lands. (Ala.) *Alabama Coal etc. Co. v. Shackelford*, 23.

3. RECEIVERS—Corporations.—It is no Ground for the appointment of a receiver for a corporation that its stockholders are not allowed access to the corporate books and papers, or that the directors refuse to disclose material facts connected with the corporate business. (Ala.) *Alabama Coal etc. Co. v. Shackelford*, 23.

4. RECEIVER FOR CORPORATION.—A stockholder in a corporation cannot invoke the action of a court of equity in appointing a receiver for the corporation to meet a necessity produced by his own wrong. (Ala.) *Alabama Coal etc. Co. v. Shackelford*, 23.

5. CORPORATIONS—Creditor's Bill by Receiver.—Suit by a receiver of a corporation on behalf of a judgment creditor to collect an assessment against stockholders is not prematurely brought, though all of the corporate debts have not been ascertained and leave has not been obtained to institute such suit. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

RECORDING.

See Landlord and Tenant, 2; Mortgages, 4.

REHEARING.

See Appeal and Error.

Note.

Remaindermen. See Judgments Against Persons not in Being.

REPLEVIN.

1. **REPLEVIN**—Title in Third Person as a Defense.—The rule that a defendant in replevin may show title in a third person, if it goes to disprove the plaintiff's claim, does not apply when the plaintiff claims under a deed from the defendant alone. (Mo.) *Layson v. Cooper*, 545.

2. **REPLEVIN**.—A Judgment for the Defendant for Costs, but Saying Nothing About the Return of the Property to Him in an action of replevin in which possession had been taken by a sheriff does not preclude the plaintiff from maintaining a subsequent action against the sheriff for the possession of such property. It is optional with the defendant in an action of replevin whether he will take a judgment for the return of the property or leave it to the result of some subsequent action. (Kan.) *Johnson v. Boehme*, 357.

REPORTS AND INFORMATION.

See Property.

RESCUING LIFE AND PROPERTY.

See Negligence, 3, 9.

RES GESTAE.

See Homicide.

RES JUDICATA.

See Judgments, 12, 13; Parent and Child.

Note.

Res Judicata, habeas corpus proceedings for the custody of children, effect of decisions in, 403.

REVERSAL OF JUDGMENT.

See Garnishment.

ROBBERY.

ROBBERY—Snatching a Purse from the Hand.—If one, with an intent to steal, suddenly snatches a purse secured by a chain around the owner's finger, breaking the chain and injuring the finger, the offense is robbery, and not larceny from the person. (Ga.) *Smith v. State*, 165.

RUNAWAY TEAM.

See Highways

SALARY.

See Master and Servant; Officers.

SALES.

1. **SALES—Warranty.**—A manufacturer's printed warranty remaining pasted on an article when sold by a dealer, who has purchased from such manufacturer and sold to a third person without any express representation or warranty does not bind such dealer. (Minn.) *Pemberton v. Dean*, 503.

2. **SALE.**—A Warranty of Title in a sale of personal property is not negotiable, and does not run with the article sold. (Ga.) *Smith v. Williams*, 220.

3. **SALE—Breach of Warranty of Title.**—The Measure of Damages on a breach of warranty of title to personal property, is the purchase money, with interest, and expenses properly incurred by the vendee in attempting to defend his title. (Ga.) *Smith v. Williams*, 220.

4. **SALE—Breach of Warranty of Title.**—The Measure of Damages against the original warrantor of the title to personal property cannot be increased by reason of liabilities subsequently incurred by his vendee on account of independent warranties of the same property to later purchasers. (Ga.) *Smith v. Williams*, 220.

5. **SALE—Breach of Warranty of Title.**—Attorney's Fees cannot be recovered by a vendee in a suit for a breach of warranty of title, where there is no allegation that the vendor was guilty of fraud or bad faith when he made the sale. (Ga.) *Smith v. Williams*, 220.

6. **CONDITIONAL SALES** Erroneous Judgment.—If a contract for the sale of personalty provides that title shall remain in the vendor until notes given for the purchase price are paid, that the vendor may retake the property for default in payment, that payments then made shall be considered as made for use, and that the rental value shall be a certain amount per month, and, in default of any payments on the notes the vendor retakes and sells the property, the consideration for the notes fails, and a judgment for the difference between the amount of the notes and the proceeds of the sale, is erroneous and cannot be sustained. (Mich.) *McBryan v. Universal Elevator Co.*, 453.

See Constitutional Law, 3.

SALOON-KEEPER.

See Innkeepers.

SERVICE OF PROCESS.

See Process.

SETOFF.

See Banks and Banking, 4; Partnership, 3.

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SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Discretion of the Court.—An application for specific performance is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with his contract, and it will not be granted if it would be inequitable and work hardship upon the party against whom it is asked. If, since the contract, the value of the land has greatly increased, and the conditions changed, and the vendee is in a condition where the enforced performance would greatly damage him and especially where the purchaser is chargeable with the delay by reason of the failure to perform, equity will refuse to compel the vendor to convey. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

2. SPECIFIC PERFORMANCE—Losing Right to by Long Delay and Permitting Adverse Interests to Grow up.—If one holding a contract for the purchase of lands delays for nine years completing payment of the purchase price, during which time he permits the vendor to remain in possession, and rents from him and pays rent for some years, and finally oil is discovered and the lands are greatly increased in value, and leases are made by the vendor for the purpose of permitting and encouraging the development of an oil field, and large expenditures are made thereunder with the knowledge of the purchaser and without his protest, he can no longer maintain suit for specific performance of the contract to convey. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

3. SPECIFIC PERFORMANCE—Estoppel.—A person who stands by without making known his rights, and encourages and permits an innocent purchaser to negotiate an oil lease with the owner of the property and to thereafter incur great expenditure in the search for and developing of oil, is estopped from maintaining a suit against the land owner and such lessee to enforce a contract to purchase the lands entered into before such lease was made. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

4. PAROL GIFT OF REAL PROPERTY—Specific Performance of.—One who, upon the faith of a gift from the owner, enters into the possession of real property and makes improvements of a valuable and permanent character, becomes entitled to specific performance by the owner. (Tex.) *Cauble v. Worsham*, 871.

5. SPECIFIC PERFORMANCE will not be Decreed of a Contract Made with Intent to Defraud Creditors. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

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See Assignment, 8.

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See Assignment, 8.

SPIRITUALISM.

See Wills, 8-10.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

See Constitutional Law.

STOCK AND STOCKHOLDERS.

See Corporations.

STREETS.

See Dedication; Highways; Municipal Corporations.

STRIKES.

See Carriers, 17-19.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Boundaries.

SWAMP LANDS.

See Public Lands, 3.

TAXATION.

1. **TAXATION of Property Belonging to a City.**—Waterworks Owned by a City and operated to supply public buildings and places and for protection against fire and for furnishing water to the public at fixed charges, and the rentals of which go into the public treasury and are expended for public benefit, are not subject to taxation. (Kan.) Sumner County v. City of Wellington, 396.

2. **CONSTITUTIONAL LAW—Exemption from Taxation.**—Where a constitution declares that the legislature shall provide for a uniform and equal rate of taxation, and that certain specified classes of property shall be exempt from taxation, this does not preclude the legislature from exempting other property. (Kan.) Sumner County v. City of Wellington, 396.

3. **CONSTITUTIONAL LAW—Taxation—Retroactive Statute.**—A statute attempting to create a personal liability to pay assessments previously made on land, where no liability existed when the assess-

ments were made, is unconstitutional and void. (Mich.) *City of Grand Rapids v. Lake Shore etc. Ry. Co.*, 473.

Note.

Tax Sales, adjournment of, power of officer to order, 655, 656.

TELEGRAPHS AND TELEPHONES.

1. TELEGRAPH CORPORATIONS—Damages for Mental Anguish, When not Admissible.—In an action against a telegraph corporation for the negligent failure to deliver a message summoning the plaintiff to the bedside of his mother then fatally ill, it is not permissible to prove that she frequently inquired for her son and kept calling his name and asked why he did not come to her. (Tex.) *Western Union Tel. Co. v. Waller*, 936.

2. TELEGRAPH CORPORATIONS—Conflict of Laws.—The fact that damages for mental anguish are not recoverable in a state or country where a telegraph message should have been delivered will not prevent their recovery in an action in the state whence the message was sent, if recoverable by its laws. (Tex.) *Western Union Tel. Co. v. Waller*, 936.

3. TELEPHONE COMPANIES—Negligence—Defense.—It being the duty of a telephone company to remove its wires from a building after the discontinuance of telephone service therein, and negligence per se to fail to do so, it is no defense for it in an action sounding in damages for injury to a third person resulting from such wires being negligently allowed to remain therein, that the company did all that could be done to obviate the danger of their being there. (Ala.) *Southern Bell Telephone etc. Co. v. McTyer*, 62.

4. TELEPHONE COMPANIES—Negligence—Liability to Third Persons.—If telephone service has been discontinued in, and the instruments removed from, a building in which a mercantile business is carried on, and the telephone company, instead of removing its wires as suggested by the owner of the building, merely cuts them loose from the instrument, twists their ends together and leaves them dangling in the building, so that atmospheric electricity, striking them somewhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property therein, this is negligence per se on the part of the telephone company, and renders it liable in damages for whatever injuries may result to customers, persons and property rightfully on the premises. (Ala.) *Southern Bell Telephone etc. Co. v. McTyer*, 62.

See Eminent Domain.

TENANCY IN COMMON.

1. JOINT OWNERSHIP by an Individual and a Society.—If a lot is conveyed to an individual and a society, the latter being unable to acquire legal title because unincorporated, and a building is erected under an agreement that each shall build and own a certain portion, and thereafter the society holds continuous possession of its part of the building, claiming one-half of the lot, and finally becoming incorporated, a grantee under a deed from the individual alone, which excepts the portion of the building owned by the society, takes with notice of the society's claim. (Iowa) *Truth Lodge No. 213 etc. v. Barton*, 308.

2. COTENANCY—Ouster and Adverse Possession.—The conveyance of the entire property by one cotenant operates as an ouster of the others, and serves as a basis for adverse possession by the grantee. (Iowa) *Murray v. Quigley*, 276.

3. COTENANTS—Statute of Limitations—Effect of a Suit by Some of the Cotenants.—A suit by one cotenant does not stop the running of the statute of limitations against another in favor of whom no right is asserted by such suit. (Tex.) *Cauble v. Worsham*, 871.

See Joint Tenancy.

TIME THE ESSENCE.

See Contracts, 3, 4.

TORTS.

See Contracts, 24-26; Negligence.

TRESPASS.

TRESPASS—Essentials of.—In order to maintain trespass for the wrongful taking of personal property, the plaintiff must show that he had at the time of the taking the actual possession of the property or the right of immediate possession. (Ala.) *Johnson v. Wilson*, 52.

TRESPASSERS.

See Carriers, 23-25.

TRIAL.

1. TRIAL—Right to Open and Close.—In an action against sureties on a note, the execution of which is admitted, in which they interpose as a defense a claim for damages in favor of their principal, they are entitled to open and close the case. (Kan.) *Park v. Ensign*, 352.

2. PRACTICE—Demurrer to the Evidence—Right to Interpose, When not Waived.—If the plaintiff offers in evidence a part of the record in another action, the defendant may call for, and read, the remainder of it, without waiving his right of demurrer to the evidence. (Tenn.) *Cooley v. Galyon*, 823.

3. PRACTICE—Demurrer to the Evidence—Cross-examination does not Waive Right to Interpose.—On cross-examination, the defendant may bring out any matter pertinent to the issue, and by the exercise of such right he does not waive his right of demurrer to the evidence. (Tenn.) *Cooley v. Galyon*, 823.

4. JURY TRIAL—Where Instructions are in Such Conflict as to Confuse the Jury, the judgment should be reversed. (Tex.) *Houston etc. Ry. Co. v. De Walt*, 877.

5. JURY TRIAL—Where Conflicting Theories are Included in a Charge, one of which is erroneous as a matter of law, the judgment must be reversed, though the other was correct, if it cannot be known but the jury acted upon the erroneous theory. (Tex.) *Gulf etc. Ry. Co. v. Garren*, 939.

6. JURY TRIAL—Error in One Instruction, When not Cured by Others.—An instruction that a servant of a railway must obey the

orders of his superior, and if the work required is extrahazardous, the company is responsible for the master's orders being obeyed, is erroneous, and the error is not cured nor rendered harmless by other instructions correctly defining negligence and contributory negligence and informing the jury that the plaintiff cannot recover if guilty of contributory negligence. (Tex.) *Houston etc. Ry. Co. v. De Walt*, 877.

7. INSTRUCTION.—A Party cannot Complain of an instruction given at his own request. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.

8. TRIAL—Instructions.—A request to give written charges to the jury as an entirety is properly refused, if any of them is improper. (Ala.) *Verberg v. State*, 17.

See Criminal Law.

TROVER AND CONVERSION.

1. TROVER—Evidence.—If in trover or trespass both parties derive title to the property from the same person by virtue of a mortgage executed by him, but the mortgage to the defendant was executed under an assumed name, his mortgage is not admissible in evidence, nor is the fact admissible that he sold the property included in the mortgage to the mortgagor. (Ala.) *Johnson v. Wilson*, 52.

2. TROVER—Essentials of.—To support an action of trover, the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion. (Ala.) *Johnson v. Wilson*, 52.

3. TROVER—Burden of Proof.—If by the terms of a chattel mortgage the right of the mortgagee to take possession of the property is postponed until the maturity of the note secured by the mortgage, he cannot maintain an action for the conversion or taking of the mortgaged property until after the law day of the mortgage, and the burden of proof is on him to show that the conversion or taking occurred after his right to take possession accrued under the mortgage. (Ala.) *Johnson v. Wilson*, 52.

4. TROVER AND CONVERSION—Attachment—Dismissal.—If the owner of goods turns them over to another, who has them shipped in his own name by a carrier to himself as consignee, and a creditor of the owner attaches them while in transit, induces the attaching officer to turn them over to him and then dismisses his attachment, he becomes a trespasser, and has no such legal possession of the goods as is a defense to an action for their conversion by the shipper, although the claim of the latter to them is founded in fraud. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

5. TROVER AND CONVERSION—Dismissal of Attachment—Trespass—Removal of Goods—Estoppel.—If a creditor of the owner of goods which are in the legal possession of a third person, after attaching them and gaining possession of them from the attaching officer, dismisses his attachment, he becomes a trespasser, and if he then transports the goods to another state, and again attaches them, prosecuting his attachment there to judgment, such judgment is void for want of jurisdiction, and no defense to a suit for conversion by the person entitled to the legal possession of the goods; nor is the latter estopped to question the jurisdiction of the court rendering such judgment, although his claim to the goods is founded in fraud. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

6. WRONGFUL ATTACHMENT as Defense to Conversion.—A person who has unlawfully and wrongfully obtained the possession of, and attached goods, and afterward sold them, under the judgment of a court which has no jurisdiction, cannot, in a suit for their conversion by one entitled to their legal possession, justify the seizure, possession and sale of the goods on the ground that the claim of the person entitled to their legal possession is founded in fraud of the rights of the former as a creditor. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

7. TROVER AND CONVERSION Lien for Freight Charges as Defense.—A carrier's lien for freight charges cannot be sold or assigned, and if a creditor of the true owner of goods pays the freight charges thereon and takes an assignment of the carrier's lien, thereby obtaining possession of the goods, such lien is no defense in a suit for the conversion of the goods by one who is entitled to the legal possession thereof. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

8. TROVER AND CONVERSION—Estoppel to Maintain—Wrongful Attachment.—A statement by the purchaser of goods that he is indebted to a certain creditor in a specified sum, who is willing to carry the indebtedness and not allow it to bother the purchaser or interfere with his paying other creditors, verified by such creditor, after a sale of goods to such purchaser, does not estop such creditor from maintaining an action for the conversion of the goods of the purchaser in his legal possession, wrongfully attached by the creditor making such sale and to whom the statement was made. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

9. TROVER AND CONVERSION—Possession of Goods.—If goods have been delivered to a carrier by a shipper to be transported and delivered to himself as consignee, he has the possession of the goods and by virtue thereof has the right to recover them or their value from anyone who seizes them en route except the true owner, and if a third person wrongfully obtains possession of them, he cannot defeat the shipper's action of trover for their value, by showing title in another, without connecting himself with the right of such other. (Mo.) *Rosencranz v. Swofford Bros. etc. Co.*, 609.

TRUST DEEDS.

See Building and Loan Associations, 3.

TRUSTS.

See Charities; Municipal Corporations, 6

USES AND TRUSTS.

See Charities.

USURY.

1. INTEREST—Usury—"Legal Rate"—"Contract Rate."—A statute relating to usury and using the expression "legal rate of interest," means the statutory rate obtaining in absence of a contract fixing the rate, and not the rate which may be legally contracted for. The words therein, "contract rate," mean any rate above the "legal rate" which may be legally fixed by contract. (Mo.) *McDonnell v. De Soto Savings etc. Assn.*, 592.

2. USURY—Conflict of Laws.—If a contract is made in one state to be performed in another, the parties may contract for the highest rate of interest allowed by either state without offending against the usury laws of the other, unless this is done as a subterfuge and device to evade usury laws. (Ala.) *United States Savings etc. Co. v. Beckley*, 19.

3. USURY—Conflict of Laws.—If a contract is not usurious in the state where it is made and is to be performed, it will be enforced in another state notwithstanding it would have offended against the usury laws of that state had it been made there. (Ala.) *United States Savings etc. Co. v. Beckley*, 19.

4. USURY—Conflict of Laws—Mortgage to Secure Loan.—The taking of a mortgage on lands in one state to secure the payment of money borrowed in another does not change the rule in respect to the laws of the place which are to govern the transaction as to usury. This is governed by the laws of the state where the money is borrowed. (Ala.) *United States Savings etc. Co. v. Beckley*, 19.

5. USURY—Conflict of Laws.—Mortgages on land in one state made to a corporation organized and acting in another state in the usual and customary form adopted by such corporation in doing like business, legal in its home state, and containing a stipulation that they are to be governed by the laws of that state, are not mere devices to evade the usury laws of the other state, or made for that purpose, though opposed thereto. (Ala.) *United States Savings etc. Co. v. Beckley*, 19.

See Building and Loan Associations.

VENDOR AND VENDEE.

1. A PURCHASER of an Equity Gets Only Such Title as the Vendor has.—Such a purchaser, knowing that the legal title is outstanding, is not a bona fide purchaser, and gets his equity subject to all defenses existing against it in the hands of his vendor. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

2. ORAL RESCISSION OF CONTRACT for the Purchase of Land. A contract for the purchase and sale of real property may be rescinded by word of mouth, if the contract is destroyed pursuant to agreement, or the possession is retained. The surrender to its maker of the rights contracted for is tantamount to its actual destruction. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

3. NOTICE TO PURCHASER.—Actual Possession of Land is notice to a purchaser of the rights of a person in possession. (W. Va.) *Lowther Oil Co. v. Miller etc. Oil Co.*, 1027.

4. CONVEYANCE—Evidence Insufficient to Establish.—Testimony that a witness contracted for and bought from another person a "lifetime interest," and that he does not remember the wording of the deed, is too uncertain to establish a conveyance of any particular character, and does not warrant the submission of the case to the jury on the assumption that any party might have acquired rights through the conveyance. (Tex.) *Cauble v. Worsham*, 871.

5. PAROL GIFT OF REAL PROPERTY—Title of the Donee.—One who enters upon real property by virtue of a parol gift thereof and does such acts as entitle him to specific performance, acquires an estate of freehold and inheritance, and may maintain trespass to try title either against the vendor or other persons. (Tex.) *Cauble v. Worsham*, 871.

See Covenants; Deeds.

WAREHOUSEMEN.

WAREHOUSEMAN'S Liability as Affected by Capacity and Wealth.—The capacity of a warehouseman is not the true test of his liability; and the care required of him is the same, whether he is rich or poor. (Colo.) *Denver etc. R. R. Co. v. Peterson*, 76.

Note.

Warehouseman, carrier's liability, when reduced to that of, 84-105.

See Common Carriers.

WARRANTS.

See Bills and Notes, 4.

WARRANTY.

See Sales.

WATERS AND WATERCOURSES.

ACCRETION AND RELICTION—Drying up of Shallow Lake. A lake without definite shore line, having an outlet but no definite inlet nor subterranean source of supply, usually grown up with rushes and grass, generally not exceeding five or six feet in depth, and drying up and refilling with the variation of seasons, is not a lake such as to give occasion for the application to the doctrines of accretion and reliction. (Iowa) *Carr v. Moore*, 292.

See Boundaries.

WILLS.

1. **WILLS—Construction—Contradictory Clauses.**—Of two contradictory clauses in a will, the first must give way, and the last take effect if both refer to the same subject matter, and the last is clearly inconsistent with the first. (Pa. St.) *Phillips' Estate* (No. 1), 743.

2. **WILLS—Construction—Contradictory Clauses.**—If the first and main provision in a will plainly covers the whole subject matter, and is defined in terms that exclude all doubt, and a subsequent subsidiary and contradictory provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely or of modifying the original gift, such subsidiary provision must ordinarily be confined to its partial and restricted operation. (Pa. St.) *Phillips' Estate* (No. 1), 743.

3. **WILLS—Construction—Contradictory Clauses.**—The first clearly expressed purpose of a testator in his will, is not to be overborne by subsequent modifying directions therein, that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention. (Pa. St.) *Phillips' Estate* (No. 1), 743.

4. **WILLS—Construction of Doubtful Clauses—Intestacy.**—In the construction of doubtful or inconsistent clauses in a will, that interpretation must be adopted, if possible, which avoids an intestacy. (Pa. St.) *Phillips' Estate* (No. 1), 743.

5. **WILLS—Construction—Contingent Remainders—Executory Devises.**—A devise to a person named, "for life, with remainder to her children, share and share alike, the child or children of a deceased child to represent and take the parent's share," carries a vested transmissible interest in remainder to the child of the life tenant, and children born to such child during the life of the tenant for life take by way of executory devise. (S. C.) Rutledge v. Fishburne, 757.

6. **WILLS—Subsequently Acquired Real Estate.**—Under the common law a will passes only such real estate as the testator owned at the time of its execution, but under the Colorado statutes it passes after-acquired realty if such appears to be the testator's intention. (Colo.) Clayton v. Hallett, 117.

7. **WILLS—Insane Delusions.**—To justify the setting aside of a will on the ground that the testator was possessed of an insane delusion, it must be shown, not merely that he was the victim of such delusion, but also that he was controlled by it in the making of his will, and was led by it to improperly disregard his natural heirs. (Pa. St.) Buchanan v. Pierie, 725.

8. **WILLS—Believers in Spiritualism,** when testamentary capacity is in question, must be considered in the same light as those who share in any other religious belief. (Pa. St.) Buchanan v. Pierie, 725.

9. **WILLS—Spiritualism as Avoiding.**—The will of one who believes in spiritualism is not, on that account alone, void; nor is it evidence of mental unsoundness. It must be shown, in order to avoid a will on that account, that it was the offspring of such belief. (Pa. St.) Buchanan v. Pierie, 725.

10. **WILLS—Spiritualism as Avoiding.**—A mere belief of the testator that he could, through mediums, communicate with the spirits of the dead, is not sufficient to avoid his will, without proof that he believed or admitted that he was influenced in any way by spirits in making his will, especially when he has amply provided therein for his natural living heirs. (Pa. St.) Buchanan v. Pierie, 725.

See Power of Sale.

WITNESSES.

1. **WITNESSES.—A Wife is not Competent to Testify,** in replevin against her husband alone, that the property belongs to her. (Mo.) Layson v. Cooper, 545.

2. **WITNESSES.—Conversations Between Husband and Wife** a short time before he was shot are inadmissible in an action to recover his life insurance. (Iowa) Sutcliffe v. Iowa State Traveling Men's Assn., 298.

3. **WITNESSES.—The Mere Presence of a Physician** does not render inadmissible the admissions of a wounded man concerning his suicide, when not made to the physician nor connected with his professional duties. (Iowa) Sutcliffe v. Iowa State Traveling Men's Assn., 298.

4. **WITNESSES—Husband and Wife—Res Gestae.**—Where a man is shot in the presence of his wife, what he did and said at the time concerning the shooting are considered parts of the res gestae, rather than communications between husband and wife, when, in an action on his life insurance policy, it is claimed that he committed suicide. (Iowa) Sutcliffe v. Iowa State Traveling Men's Assn., 298.

5. TRIALS—Right of Re-examination to Explain Answers Given on Cross-examination.—If there is any occasion to explain an answer given on cross-examination, the court should not exclude a question by way of re-examination proposed for the purpose of eliciting such explanation where there is no effort at undue repetition of the same statement. (Tex.) *Colorado etc. Ry. Co. v. Garren*, 939.

6. JURY TRIAL—Instruction Relating to the Interest of a Witness, When May be Refused.—The court may refuse an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and his interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, if testimony against him has been given by a witness who is also deeply interested in a moral sense, and no such direction as to his testimony is included in the proposed instruction. (W. Va.) *Tompkins v. Pacific Mut. Life Ins. Co.*, 1006.

See Evidence.

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WRIT OF ERROR CORAM NOBIS.

1. A WRIT OF ERROR CORAM NOBIS is Never Granted to relieve from consequences arising after the judgment. The unvarying test of the right to the writ is mistake or lack of knowledge of facts inhering in the judgment itself. (Kan.) *Collins v. State*, 361.

2. A WRIT OF ERROR CORAM NOBIS Cannot be Employed to obtain relief from the misfortune of being unable to prosecute an appeal for the correction of errors of law. Hence, it cannot be granted on the ground that the defendant was prevented from appealing his case because of his inability to make up a record embodying his exceptions within the time allowed by law. (Kan.) *Collins v. State*, 361.

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